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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 400

JACKIE PACKER FRANCIS, A MINOR, DENNY RAY FRANCIS, A MINOR, AND JAMES BRENT FRANCIS, A MINOR, BY AND THROUGH THEIR GENERAL GUARDIANS, RAY E. FRANCIS AND VIRGIL O. PACKER, PETITIONERS,

vs.

SOUTHERN PACIFIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 14, 1947.

CERTIORARI GRANTED DECEMBER 8, 1947.

United States Circuit Court of Appeals

TENTH CIRCUIT.

No. 3424

JACKIE PACKER FRANCIS, a minor, DENNIS RAY FRANCIS, a minor, and JAMES BRENT FRANCIS, a minor, by and through their general guardians, RAY E. FRANCIS and VIRGIL O. PACKER, APELLANTS,

v.

SOUTHERN PACIFIC COMPANY, a corporation, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR TUE DISTRICT OF UTAH.

FILED OCTOBER 28, 1946.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Tenth Circuit, at the May Term, 1947, of said Court, before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

On the 28th day of October, A. D. 1946, a transcript of the record, pursuant to a notice of appeal, filed in the District Court of the United States for the District of Utah, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Tenth Circuit, in a certain cause wherein Jackie Packer Francis, a minor, et al. were appellants, and Southern Pacific Company, a corporation, was appellee, which said transcript, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit, is in the words and figures following:

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE TILLMAN D. JOHNSON, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, PRESIDING IN THE FOLLOWING ENTITLED CAUSE:

JACKIE PACKER FRANCIS, a minor, DENNIS RAY FRANCIS, a minor, and JAMES BRENT FRANCIS, a minor, by and through their general guardians, RAY E. FRANCIS and VIRGIL O. PACKER, PLAINTIFFS,

Civil v. No. 906

SOUTHERN PACIFIC COMPANY, a corporation, DEFENDANTS.

Complaint.

1 Come now the plaintiffs and for cause of action against the defendant allege:

Count One.

1. That plaintiffs are citizens of the State of Utah and defendant is a corporation incorporated under the laws of the State of Kentucky; that the matter in controversy exceeds, exclusive of interest and costs the sum of $3,000.00, namely, $125,000.00; that the jurisdiction of the above court is founded on diversity of citizenship and involves an amount exclusive of interest and costs in excess of the sum of $3,000.00.

2. That the minor plaintiffs are the orphan children of Jack R. Francis and Delphia Packer Francis, deceased, and are the only heirs at law of said Jack R. Francis and Delphia Packer Francis, deceased; that plaintiff Jackie Packer Francis is eight years of age; that plaintiff Dennis Ray Francis is seven years of age; and that plaintiff James Brent Francis is three years of age; and that heretofore, to-wit, on the 18th day of January, 1945, by an order duly made and entered in the District Court of the Second

Judicial District in and for the State of Utah, County of Davis, the said Ray E. Francis and Virgil O. Packer were duly appointed guardians of the persons and estates of the said minors and each of them, and that this action is brought and instituted for and on behalf of said minors and each of them.

3. That at all times herein mentioned, the defendant, Southern Pacific Railroad Company, was and still is a corporation duly organized, created and existing according to law as a railway company and as such was and is engaged in the business of owning, maintaining and operating a line and system of steam railroad as a common carrier of both freight and passengers for hire extending into and through the states of Utah, Nevada, and California; that at all times herein mentioned, said line of railroad extended westerly from Ogden, Weber County, Utah, to and beyond the station of Bagley, Weber County, Utah, said station being approximately eighteen miles west of Ogden.

4. That in the operation of its interstate commerce business, defendant operates, between Ogden, Weber County, Utah, and San Francisco, California, certain interstate passenger trains designated as westbound Passenger Train No. First 21 and westbound Passenger Train No. Second 21, and that said trains were and are operated by time table, train orders, and an automatic block signal control system, and also under and by virtue of certain operating rules promulgated by said defendant; that at about the hour of 4:38 A. M. Pacific War Time on the 31st day of December, 1944, Passenger Train No. First 21 departed westbound from Ogden, over, upon and along defendant's westbound main line tracks, and that the said Jack R. Francis was then and there lawfully riding upon said train and occupied the status of a passenger; that thereafter on said day, at about the hour of 4:50 A. M. Pacific War Time, said Passenger Train No. Second 21 departed westbound from Ogden, Utah, over, upon and along defendant's westbound main line tracks.

5. That at about the hour of 5:14 A. M. Pacific War Time, on the said 31st day of December, 1944, while the said

Jack R. Francis was travelling as a passenger in the rear car of defendant's said westbound Passenger Train No. First 21, in the near vicinity of Bagley Station aforesaid, defendant ran and propelled its westbound Passenger Train No. Second 21 with great force and violence into the rear end of said Passenger Train No. First 21, as a result whereof, the said Jack R. Francis received the grievous and fatal injuries from which he then and their died.

3 6. Plaintiffs allege that at a point approximately 2458 feet east of the point of collision, defendant, prior to and at the time of said collision, maintained and operated a certain automatic block signal hereinafter referred to as Signal No. 7649, and that at a point 4509 feet to the east of said Signal No. 7649, defendant likewise maintained an automatic block signal referred to herein as Signal No. 7659; that said signals were constructed, maintained and used for the purpose of governing the movement of defendant's westbound trains and of giving ample, proper and timely warning of cars, trains, engines and equipment occupying the tracks ahead, and that said signals afford train crews ample time within which to reduce and retard the speed and to bring the train to a stop short of collision with other trains and equipment occupying the tracks ahead; that said automatic block signal system was and is constructed, arranged and maintained on the overlap principle and so functions that when a westbound train is standing or moving between two block signals, the two block signals immediately to the rear of said train will be in a stop position and display red; that all times herein mentioned said block signals were functioning efficiently and properly. Plaintiffs further allege that shortly prior to the occurrence of the grievance herein complained of, defendant's Passenger Train No. First 21 was on defendant's westbound main line track between Block Signal No. 7659 and the block signal immediately to the west thereof that Block Signals 7659 and 7649 were in a stop position displaying red, and that said signals were in a stop position displaying red at the time when defendant's said Passenger Train No. Second 21 approached and passed said signals and each of them and came into collision with the rear end of defendant's said

Passenger Train No. First 21 on which the said Jack R. Francis was then and there riding as aforesaid.

7. Plaintiffs allege that defendant was negligent, careless and reckless in the operation of its trains, locomotives, cars and equipment in the following particulars:

4 (a) That defendant so negligently, carelessly, recklessly, and heedlessly routed, ran, operated, and propelled its said westbound Passenger Trains No. First 21 and No. Second 21 as to cause said Passenger Train No. Second 21 to come into a rear end collision with Passenger Train No. First 21, thereby and thus causing the said Jack R. Francis to suffer the grievous, fatal injuries from which he then and there died.

(b) That defendant negligently caused said westbound Passenger Train No. Second 21 to be driven by said Block Signals 7649 and 7659 when said signals were in stop position displaying red, and into violent collision with the rear end of said westbound Passenger Train No. First 21 upon which the said Jack R. Francis was then and there riding, thereby and thus causing him to suffer the grievous and fatal injuries from which he then and there died.

(c) That defendant at all times herein mentioned had the exclusive control and management of the said westbound passenger trains and each of them, and that the collision resulting in the injuries and death of said Jack R. Francis was such that in the ordinary course of things it would not have occurred had the defendant exercised proper care; that both before and after the collision, defendant had the sole and exclusive possession and custody of said passenger trains, and the wreckage thereof, and is possessed of superior, if not exclusive, access to information concerning the precise cause of said collision, and the plaintiffs rely upon the negligence of the defendant as inferred from the general situation herein alleged. Plaintiffs further allege that had defendant exercised due care in the use, management and operation of its said trains, the collision which caused the death of Jack R. Francis would not have occurred.

8. That by reason of each and all of the acts of negligence on the part of the defendant in the use, management

and operation of its said trains as herein set forth, combined and concurring, the said Jack R. Francis was caused to and did receive and suffer the grievous personal injuries from which he then and there immediately died.

9. That decedent, before and at the time of his death, was a strong, robust, healthy young man, thirty-one years of age, and was and had been regularly employed by defendant as a conductor and brakeman, and was and had been earning from his employment approximately $350.00 per month, and prior to his death, decedent contributed regularly to the support and maintenance of the minor plaintiffs herein the sum of $180.00 per month, and that said minors and each of them were wholly dependent upon said decedent for their support and for all of the necessities of life, and that said decedent would have continued to support, protect and care for his said minor children during the remaining years of his life had his life not been cut short as a result of the carelessness and negligence of the defendant as herein alleged.

10. That decedent was a kind, loving, generous father, sincerely interested in the welfare of his family and particularly in the mental, moral, cultural and spiritual growth and development of his children.

11. That the minor plaintiffs have suffered substantial pecuniary injuries and damage in the loss of their father's protection, aid, comfort, counsel, training and society, and as a result of his untimely death, caused by the negligence, carelessness and recklessness of the defendant as herein set forth, plaintiffs have suffered injury and damage in the sum of $125,000.00.

Wherefore, plaintiffs pray judgment against the defendant in the sum of $125,000.00 and for their costs herein expended.

Count Two.

1. Plaintiffs hereby refer to the allegations set forth in paragraphs I to VI, both numbers inclusive, of Count One, and hereby incorporate said paragraphs and each and every

allegation therein contained by reference in this, their second count, as though set forth in full herein.

6 2. Plaintiffs allege that on the 31st day of December, 1944, at approximately 5:14 A. M. Pacific War Time, Jack R. Francis was lawfully riding upon defendant's westbound interstate Passenger Train No. First 21 and occupied the status of a passenger; that while such train was proceeding upon, over and along defendant's main line westbound track at or near Bagley, Utah, defendant's westbound interstate Passenger Train No. Second 21 came into violent collision with the rear end of said Passenger Train No. First 21; that said rear end collision was caused by the gross, wanton and willful negligence and misconduct of the defendant in that:

(a) Defendant wilfully and wantonly and in violation and disregard of its rules and regulations, ran and propelled its said Passenger Train No. Second 21 by Block Signals No. 7649 and 7659 and into collision with defendant's Passenger Train No. First 21 when and while said Block Signals No. 7649 and 7659 were each in stop position displaying red.

(b) That defendant, well knowing that its Passenger Train No. First 21 or some other train was either standing or moving between Block Signal 7649 and the block signal immediately to the west thereof, nevertheless drove and propelled its said Passenger Train No. Second 21 at a high, dangerous and excessive rate of speed, to-wit, at a speed of 65 miles per hour, by Block Signals 7649 and 7659 and into collision with defendant's Passenger Train No. First 21, when and while said block signals and each of them were in a stop position displaying red.

3. That by reason of each and all of the acts of gross negligence and willful and wanton misconduct on the part of the defendant in the use, management and operation of its said trains as herein set forth, combined and concurring, the said Jack R. Francis was caused to and did receive and suffer the grievous fatal injuries from which he then and there died.

7 4. That defendant, before and at the time of his death, was a strong, robust, healthy young man, thirty-one years of age, and was and had been regularly employed by defendant as a conductor and brakeman, and was and had been earning from his employment approximately $350.00 per month, and prior to his death, decedent contributed regularly to the support and maintenance of the minor plaintiffs herein the sum of $180.00 per month, and that said minors and each of them were wholly dependent upon said decedent for their support and for all of the necessities of life, and that said decedent would have continued to support, protect and care for his said minor children during the remaining years of his life had his life not been cut short as a result of the carelessness and negligence of the defendant as herein alleged.

5. That decedent was a kind, loving, generous father, sincerely interested in the welfare of his family and particularly in the mental, moral, cultural and spiritual growth and development of his children.

6. That the minor plaintiffs have suffered substantial pecuniary injuries and damage in the loss of their father's protection, aid, comfort, counsel, training and society, and as a result of his untimely death, caused by the negligence, carelessness and recklessness of the defendant as herein set forth, plaintiffs have suffered injury and damage in the sum of $125,000.00.

Wherefore, plaintiffs pray judgment against the defendant in the sum of $125,000.00 and for their costs herein expended.

PARNELL BLACK,
B. E. ROBERTS,
RAWLINGS, WALLACE & BLACK,
Attorneys for Plaintiffs.

(Duly Verified.)

Filed in United States District Court, December 10, 1945.

Answer.

Comes now Southern Pacific Company and for answer to plaintiffs' Complaint, admits, denies and alleges:

8 1. For answer to paragraph I, Count One of said complaint, Southern Pacific Company admits that plaintiffs are citizens of the State of Utah and denies that defendant Southern Pacific Railroad Company is a citizen of the State of Kentucky. It admits that Southern Pacific Company is a resident of the State of Kentucky and that the amount involved in the action, exclusive of interest and costs, exceeds $3,000.00.

2. For answer to paragraph II, Count One, Southern Pacific Company admits that Ray E. Francis and Virgil O. Packer were appointed guardians of the persons and estates of plaintiffs.

3. For answer to paragraph III, Count One, Southern Pacific Company alleges that it is a corporation and is engaged in the business of operating an interstate railway from Ogden in the State of Utah to San Francisco in the State of California; that there is a station on its line at Bagley, approximately eighteen miles west of Ogden.

4. For answer to paragraph IV, Count One, Southern Pacific Company alleges that it operates west-bound passenger trains from Ogden in the State of Utah to San Francisco in the State of California; that on December 31, 1944, one of said trains, designated Passenger Train No. 21, left Ogden in two sections, designated as Passenger Trains No. First 21 and Second 21, respectively. Further answering said paragraph, Southern Pacific Company alleges that Jack R. Francis did, on said 31st day of December, 1944, board said passenger train No. First 21 at Ogden, Utah for the purpose of being transported to Carlin in the State of Nevada; that he did not pay the fare provided for such transportation or any consideration whatsoever but presented to the conductor of said train a free pass issued to him gratuitously by Southern Pacific Company authorizing his transportation on said train from Ogden in the State

of Utah to Carlin in the State of Nevada; that said free pass was accepted by said Jack R. Francis and used by him subject to the conditions printed thereon and accepted by said Jack R. Francis, which conditions were as follows:

"Conditions.

9 "This free pass is not transferable, will be taken up and forfeited if presented or used by a person not designated on its face, and is subject to revocation at any time without notice. In its use the user assumes all risk of injury to person or property and of loss of property whether by negligence or otherwise, and absolves the issuing company and its officers and employes from any liability therefor. Use hereof in violation of any law is prohibited."

5. For answer to paragraph V, Count One, Southern Pacific Company admits that while said Jack R. Francis was riding upon said passenger train under the conditions imposed by said free pass a collision occurred between said passenger train and Passenger Train No. Second 21, as the result of which the said Jack R. Francis died.

6. For answer to paragraph VI, Count One, Southern Pacific Company admits that it maintained upon and along its railway certain automatic signal devices which were at all times functioning efficiently and properly.

7. For answer to paragraph VII, Count One, Southern Pacific Company denies that said collision resulted from its negligence, and specifically denies that it negligently, carelessly, recklessly or heedlessly routed, ran, operated, or propelled its west-bound Passenger Trains No. First 21 and No. Second 21, and denies that it negligently caused west-bound Passenger Train No. Second 21 to be driven into and propelled against west-bound Passenger Train No. First 21.

8. For answer to paragraph VII, Count One, Southern Pacific Company admits that Jack R. Francis died as the result of a collision, but denies that such collision and death resulted from its negligence.

9. For answer to paragraph IX, Count One, Southern Pacific Company is not informed as to what contributions Jack R. Francis made to plaintiffs and requires plaintiffs to make proof with respect thereto.

10. Southern Pacific Company denies each and every allegation in Count One not hereinbefore specifically admitted or qualified.

11. For answer to paragraph I, Count Two, Southern Pacific Company adopts its answer to paragraphs I to VI of Count One.

12. For answer to paragraph II, Count Two, Southern Pacific Company admits that a collision occurred between Passenger Trains No. First 21 and No. Second 21, and denies that said collision was caused by the gross, wanton or wilful or negligent conduct of Southern Pacific Company. Southern Pacific Company denies that it was guilty of any wilful or wanton misconduct of any kind whatsoever.

13. For answer to paragraph III, Count Two, Southern Pacific Company denies that Jack R. Francis died as the result of any act of gross negligence or wilful or wanton misconduct on the part of Southern Pacific Company.

14. For answer to paragraph IV, Count Two, Southern Pacific Company is without information as to what contributions said Jack R. Francis made to plaintiffs and requires plaintiffs to make proof with respect thereto.

15. Southern Pacific Company denies each and every allegation in Count Two not hereinbefore specifically admitted or qualified.

16. Further answering said complaint and both counts thereof, and as separate and additional defenses thereto, Southern Pacific Company alleges that Jack R. Francis, at and immediately prior to the time of his death, was upon Passenger Train No. First 21 bound from Ogden in the State of Utah to Carlin in the State of Nevada. At such time he was not a paying passenger but was riding said train upon a free pass gratuitously issued to said Francis

for said trip by Southern Pacific Company; that said free pass was issued by Southern Pacific Company and received and used by said Jack R. Francis upon the conditions printed upon said pass and accepted by said Jack R. Francis, which conditions are as follows:

"Conditions.

"This free pass is not transferable, will be taken up and forfeited if presented or used by a person not designated on its face, and is subject to revocation at any time without notice. In its use the user assumes all risk of injury to person or property and of loss of property whether by negligence or otherwise, and absolves the issuing company and its officers and employes from any liability therefor. Use hereof in violation of any law is prohibited."

11 Wherefore, Southern Pacific Company, having fully answered, prays that plaintiffs take nothing and that it be dismissed hence with its costs.

PAUL H. RAY,
S. J. QUINNEY,
A. H. NEBEKER,
Attorneys for Southern Pacific Company.

Received copy of the foregoing Answer this 10th day of January, 1946.

PARNELL BLACK and
B. E. ROBERTS,
Attorneys for Plaintiffs.

Filed in United States District Court, January 10, 1946.

Motion to Strike.

Comes now the plaintiffs and move the Honorable Court to strike the following allegations from defendant's Answer, upon the ground that said allegations are redundant and immaterial:

1. The following allegations contained in Paragraph 4 of said Answer:

"Further answering said paragraph, Southern Pacific Company alleges that Jack R. Francis did, on said 31st day of December, 1944, board said passenger train No. First 21 at Ogden, Utah for the purpose of being transported to Carlin in the State of Nevada; that he did not pay the fare provided for such transportation or any consideration whatsoever but presented to the Conductor of said train a free pass issued to him gratuitously by Southern Pacific Company authorizing his transportation on said train from Ogden in the State of Utah to Carlin in the State of Nevada; that said free pass was accepted by said Jack R. Francis and used by him subject to the conditions printed thereon and accepted by said Jack R. Francis, which conditions were as follows:

'Conditions.

'This free pass is not transferable, will be taken up and forfeited if presented or used by a person not designated on its face, and is subject to revocation at any time without notice. In its use the user assumes all risk of injury to person or property and of loss of property whether by negligence or otherwise, and absolves the issuing company and its officers and employes from any liability therefor. Use hereof in violation of any law is prohibited.'"

2. The following allegation contained in Paragraph 5 of said Answer:

"under the conditions imposed by said free pass."

3. Each and every allegation contained in Paragraph 16 including the recitation of conditions printed upon the pass therein referred to.

12 4. The allegations contained in Paragraph 16 insofar as said paragraph is alleged to be an answer to Count One of Plaintiffs' Complaint.

5. The allegations contained in Paragraph 16 insofar as said paragraph is alleged to be an answer to Count Two of Plaintiffs' Complaint.

PARNELL BLACK,
B. E. ROBERTS,
RAWLINGS, WALLACE & BLACK,
Attorneys for Plaintiffs.

Received copy of the foregoing Motion this 17th day of January, 1946.

PAUL H. RAY,
S. J. QUINNEY,
A. H. NEBEKER,
Attorneys for Southern Pacific Company.

Filed in United States District Court January 17, 1946.

Minute Entry—January 31, 1946.

On this 31st day of January, 1946, plaintiff appearing by Parnell Black and Brigham E. Roberts, his attorney, and defendant by Paul A. Ray and Grant Aadnesen, its attorneys, and pursuant to stipulations filed, it is ordered that this case be transferred from the northern to central division for hearing on the plaintiff's motion to strike from defendant's answer. The Court heard the arguments of counsel and denied the motion to strike.

Stipulation.

It is hereby Stipulated by and between the parties hereto that the above entitled case may be heard in the Central Division of the United States District Court in and for the District of Utah.

Dated this 13 day of March, 1946.

RAWLINGS, WALLACE & BLACK,
PARNELL BLACK,
B. E. ROBERTS,
Attorneys for Plaintiffs.
PAUL H. RAY,
A. H. NEBEKER,
GRANT C. AADNESEN,
Attorneys for Defendant.

Filed in United States District Court, March 13, 1946.

Order.

13 It is hereby Ordered in accordance with the Stipulation entered into by and between the parties hereto that the above entitled case may be heard in the Central Division of the United States District Court in and for the District of Utah.

Dated this 13 day of March, 1946.

TILLMAN D. JOHNSON, Judge.

Filed in United States District Court, March 13, 1946.

Minute Entry—April 1, 1946.

On this 1st day of April, 1946, plaintiffs, appearing by Parnell Black, their attorney, and defendant appearing by Paul H. Ray and Grant Aadnesen, its attorneys, and these cases came on for pre-trial hearing, and it was ordered that they be consolidated for pre-trial and trial. Issues were summarized and ordered transcribed by the court reporter. Pre-trial order to be submitted for signature.

Pretrial Order.

This cause coming on for pretrial on the 1st day of April, 1946, Mr. Parnell Black appearing for plaintiffs, and Mr. Paul H. Ray and Mr. Grant C. Aadnesen for defendant.

Now, Therefore, upon the statements of counsel for the respective parties as to the issues of law and of fact to be tried, the following summary of said issues is hereby made and ordered filed herein, to-wit:

The legal effect of the free pass upon which plaintiffs' deceased father was riding at the time of his injury and death.

The issue with respect to the conduct of the engineer and possibly the fireman of the engine involved in the collision in question, being the engine on the second division of Train 21.

14 Whether the defendant was guilty of negligence and the effect thereof, and whether such negligence was gross and the effect thereof. Whether defendant was guilty of wilful and wanton misconduct and the effect thereof.

The amount, if any, which plaintiffs may be entitled to recover.

TILLMAN D. JOHNSON,
United States District Judge.

Stipulation.

It is stipulated by the parties that the foregoing may be signed as pretrial order without prejudice to the right of the plaintiffs to contend that the law applicable to the cases recognizes degrees of negligence, and without prejudice to the right of defendant to contend that the law applicable to the cases does not recognize degrees of negligence and does not distinguish between ordinary and gross negligence.

RAWLINGS, WALLACE & BLACK,
PARNELL BLACK,
B. E. ROBERTS,
Attorneys for Plaintiffs.
PAUL H. RAY,
S. J. QUINNEY,
A. H. NEBEKER,
Attorneys for Defendant.

Filed in United States District Court, April 3, 1946.

Verdict.

We, the jury, duly empaneled and sworn in the above entitled cause find the issues joined in favor of the defendant, Southern Pacific Railroad Company, a corporation, and against the plaintiffs, Jackie Packer Francis, et al., "No Cause of Action".

Dated: May 2, 1946.

MARJORIE McMURRIN, Foreman.

Filed in U. S. District Court May 2, 1946.

Judgment.

186 This consolidated case came on regularly for trial beginning April 26, 1946, with plaintiffs appearing by Parnell Black, Calvin W. Rawlings, and Brigham E. Roberts, their attorneys, and defendant appearing by Paul H. Ray and Grant Aadnesen, its attorneys. A jury of twelve good and lawful persons was duly empaneled and sworn to well and truly try this case and true verdicts render accord-

ing to the evidence. The jurors heard the testimony on behalf of plaintiffs and defendant and certain documentary evidence was introduced. Both sides rest. In the absence of the jury, defendant made a motion for directed verdicts of no cause of action in each case, and the court heard the arguments of counsel and denied said motion. The jurors heard the arguments of counsel and instructions of the court, and retired to their room in charge of a sworn bailiff to consider of their verdicts, and after due deliberation returned the following verdicts, to wit:

"No. 906, Civil. We, the jury, duly empaneled and sworn in the above entitled cause find the issues joined in favor of the defendant, Southern Pacific Railroad Company, a corporation, and against the plaintiffs, Jackie Packer Francis, et al., 'No Cause of Action'. Dated: May 2, 1946. Marjorie McMurrin, Foreman."

"No. 907, Civil. We, the jury, duly empaneled and sworn in the above entitled cause find the issues joined in favor of the defendant, Southern Pacific Railroad Company, a corporation, and against the plaintiffs, Jackie Packer Francis, et al., 'No Cause of Action'. Dated: May 2, 1946, Marjorie McMurrin, Foreman."

Wherefore, it is ordered and adjudged by the court that plaintiffs take nothing by their complaints herein, and that defendant recover of and from plaintiffs its costs herein incurred, to be taxed upon a verified cost bill and have execution therefor.

Attest: V. P. AHLSTROM, Clerk.

Clerk's Note: Notation of judgment made on civil docket sheets in accordance with Rules of Civil Procedure on May 2, 1946.

Motion for New Trial.

187 Come now the plaintiffs in the above entitled action and move the Court for an order vacating and setting aside the verdict of the jury and the judgment and granting plaintiffs a new trial for each of the following several reasons affecting materially the substantial rights of the plaintiffs, to wit:

1. The Court erred in excluding competent, relevant, material and proper evidence offered on behalf of the plaintiffs.

2. The Court erred in admitting incompetent, irrelevant, immaterial and improper evidence offered on behalf of the defendant over the objection of plaintiffs duly made at the time.

3. The Court erred in refusing to give to the jury each of the instructions requested by plaintiffs and numbered 1 and 2.

4. Irregularity in the proceedings of the Court and jury, the adverse party, and orders of the Court and abuses of discretion by which the plaintiffs were prevented from having a fair trial.

5. Newly discovered evidence material to the plaintiffs and which the plaintiffs could not with reasonable diligence have discovered and produced at the trial.

6. Insufficiency of the evidence to justify the verdict.

7. Error in law occurring at the trial and excepted to by the plaintiffs.

8. The verdict is against the weight of the evidence

9. The verdict is against the law and the evidence.

10. Under the pleadings and all of the evidence in the case the verdict should be in favor of the plaintiffs.

11. The Court erred in permitting the witness, Dr. Orin A. Ogilvie, to express his opinion as to the time James McDonald died, the plaintiffs having objected to said testi-

mony and the objections of the said plaintiffs having been overruled by the Court.

12. The Court erred in submitting the case to the jury solely upon the grounds that plaintiffs could only recover in the event that they found that defendant by its agents and servants was guilty of wilful and wanton negligence.

188 13. The Court erred in instructing the jury that the deceased was riding on a free pass exonerating the defendant from ordinary negligence and that such provision of the pass so exonerating defendant had been held by the Supreme Court of the United States to be valid.

14. The Court erred in refusing to submit the case to the jury upon the proposition of whether or not the defendant was guilty of ordinary negligence and in refusing to instruct the jury that if the defendant was guilty of ordinary negligence and that such negligence was the proximate cause of the death of the deceased then plaintiffs were entitled to a verdict in their favor.

15. Misconduct of the jury.

16. The Court ought to grant a new trial in the exercise of its inherent power to prevent injustice and to secure to all litigants a fair and impartial trial.

This Motion is made on the files and records of the above entitled case and upon Affidavits to be filed by the plaintiffs herein.

RAWLINGS, WALLACE & BLACK,
B. E. ROBERTS,
Attorneys for Plaintiffs.

Received copy of foregoing Motion for New Trial this 8th day of May, A. D. 1946.

PAUL H. RAY,
S. J. QUINNEY,
A. H. NEBEKER,
Attorneys for Defendant.

Filed in the United States District Court May 8, 1946.

Amended Motion for New Trial.

Come Now the plaintiffs in the above entitled action and move the Court for an order vacating and setting aside the verdict of the jury and the judgment and granting plaintiffs a new trial for each of the following several reasons affecting materially the substantial rights of the plaintiffs, to wit:

1. The Court erred in excluding competent, relevant, material and proper evidence offered on behalf of the plaintiffs.

189 2. The Court erred in admitting incompetent, irrelevant, immaterial and improper evidence offered on behalf of the defendant over the objection of plaintiffs duly made at the time.

3. The Court erred in refusing to give to the jury each of the instructions requested by plaintiffs and numbered 1 and 2.

4. Irregularity in the procedings of the Court and jury, the adverse party, and orders of the Court and abuses of discretion by which the plaintiffs were prevented from having a fair trial.

5. Newly discovered evidence material to the plaintiffs and which the plaintiffs could not with reasonable diligence have discovered and produced at the trial.

6. Insufficiency of the evidence to justify the verdict.

7. Error in law occurring at the trial and excepted to by the plaintiffs.

8. The verdict is against the weight of the evidence.

9. The verdict is against the law and the evidence.

10. Under the pleadings and all of the evidence in the case the verdict should be in favor of the plaintiffs.

11. The Court erred in permitting the witness, Dr. Orin A. Ogilvie, to express his opinion as to the time James McDonald died, the plaintiffs having objected to said testimony and the objections of the said plaintiffs having been overruled by the Court.

12. The Court erred in submitting the case to the jury solely upon the grounds that plaintiffs could only recover in the event that they found that defendant by its agents and servants was guilty of wilful and wanton negligence.

13. The Court erred in instructing the jury that the deceased was riding on a free pass exonerating the defendant from ordinary negligence and that such provision of the pass so exonerating defendant had been held by the Supreme Court of the United States to be valid.

14. The Court erred in refusing to submit the case to the jury upon the proposition of whether or not the defendant was guilty of ordinary negligence and in refusing to instruct the jury that if the defendant was guilty of ordinary negligence and that such negligence was the proximate cause of the death of the deceased then plaintiffs were entitled to a verdict in their favor.

15. Misconduct of the jury.

190 The Court ought to grant a new trial in the exercise of its inherent power to prevent injustice and to secure to all litigants a fair and impartial trial.

17. That the jury panel from which the jury in the above entitled case was selected and the jury finally selected were mostly business executives or those having the employers' viewpoint, who were purposely selected on said panel, thus giving a majority representation to one class or occupation and discriminating against other occupations and classes, particularly the employees and those in the poorer classes, who constitute by far the great majority of citizens eligible for jury service, and that by reason thereof the plaintiffs herein were denied a fair and impartial jury.

18. That in selecting the jury panel from which the jury in plaintiffs' case was chosen, persons of working classes and wage earners were purposely left off such panel and as a result no jurors representing such classes were upon the jury impaneled in plaintiffs' case, thereby denying to plaintiffs a fair trial before a fair and impartial jury.

19. That in selecting a jury panel from which plaintiffs' jury was chosen, discrimination was made against the poorer classes and wage earners and none of such were on the plaintiffs' jury, although a majority percentage of such classes constitute the citizenry of the State of Utah, thereby denying the plaintiffs a fair trial before a fair and impartial jury.

This Amended Motion is made on the files and records of the above entitled case and upon Affidavits to be filed by the plaintiffs herein.

RAWLINGS, WALLACE & BLACK,
PARNELL BLACK,
CALVIN W. RAWLINGS,
H. E. WALLACE,
B. E. ROBERTS,
Attorneys for Plaintiffs.

Received copy of foregoing Amended Motion for New Trial this 13th day of June, A. D. 1946.

PAUL H. RAY,
S. J. QUINNEY,
A. H. NEBEKER,
Attorneys for Defendant.

Filed in U. S. District Court, District of Utah, June 14, 1946.

Affidavit.

State of Utah, County of Salt Lake, ss.

191 Parnell Black, being first duly sworn, on oath, deposes and says:

That he is one of counsel for the plaintiffs in the above entitled actions;

That said actions were consolidated for trial and were tried at the same time and to the same jury and that this affidavit is made in support of the Motions for New Trial as amended;

Affiant states that at the time of the trial of the said matters he was not aware and had no information concerning the method heretofore and presently followed in the above Court for the selecting of veniremen and that he was not aware of the fact that in the selection of veniremen the Clerk of the Court and Jury commissioner had and do now consistently follow a method calculated to and which has resulted in the exclusion from jury service of members of organized labor, but that since said trial he has accumulated evidence revealing such facts, and affiant makes this affidavit for the purpose of revealing and showing the facts pertaining to the method of selection of juries and jury venires and showing, revealing and disclosing the facts indicating that a large section and portion of the citizens of the State of Utah, consisting chiefly of wage and salary earners employed in private industry, are barred from jury service by reason of the methods aforesaid and that said method of jury selection prevented plaintiffs from receiving and obtaining a fair and impartial jury trial.

That affiant caused lists to be made of the names of all persons having been called for jury service in the above entitled Court during the years 1944, 1945 and 1946, a true and correct copy of such list is attached hereto, marked Exhibit "1" and by this reference it is made a part hereof, and your affiant alleges that said Exhibit contains the names of all jurors called during said years by said Court; that said Exhibit sets forth the date when each juror was called, his or her address and the occupation of each;

192 That your affiant caused lists of said jurors to be sent to practically every labor union in the State of Utah; that said lists were sent to the officers of said unions and were checked with the lists of their members to determine whether or not any members from their Unions ever served upon a jury in the above entitled Court during said years; that a full and complete check was made and the officers of said Unions made and executed Affidavits reflecting the results of the comparison between the list of jurors and the list of members of the various Unions; copies of said Affidavits are attached hereto and marked Exhibits 2 to 67, and said exhibits are by this reference made a part of this Affidavit; that each of said exhibits is signed by an officer or representative of a labor union; that each of said Affidavits sets forth the Union of which the signer thereof is a member, the fact that he has made the comparison between the list of jurors and the list of members of his organization, whether or not any member of his organization appears to have been a juror and also sets forth the number of members of said Union;

That the total membership in said labor organizations for said years were as follows:

1944	32,129
1945	31,156
1946	31,389

That during all of said years, 1944, 1945 and 1946, there were called from the membership of the organizations set forth in said Affidavits eleven (11) individuals as jurors in the above entitled Court, to wit: 1944.....3; 1945.....4; 1946.....4.

That your affiant has examined the 1940 United States Census Report and in that connection has read a pamphlet entitled "Population, Third Series, The Labor Force, Utah," published by the United States Bureau of Census, and it appears therefrom that the State of Utah has a population of 550,310 people and of that number 389,086 are over the age of fourteen years, and of these 91,784 are employed

in private industry and earn wages and salaries and 12,962 private wage and salary workers were seeking work, making a total number of 104,746 of such workers in the State of Utah, as reflected by said census;

193 That the method of selecting juries in the above entitled court has resulted in discrimination against wage earners within the State of Utah and has denied to plaintiffs herein a fair and impartial trial before jurors properly representing all classes of persons.

PARNELL BLACK.

Subscribed and sworn to before me this 18th day of June, A. D. 1946. Emma Leishman, Notary Public, residing at Salt Lake City, Utah. My Commission expires June 19, 1949. (Notarial Seal).

Received copy of the foregoing Affidavit, together with copies of the exhibits thereto attached, this 18th day of June, A. D. 1946.

PAUL H. RAY,
S. J. QUINNEY,
A. H. NEBEKER,
Attorneys for Defendant.

Filed in U. S. District Court June 18, 1946.

Summary of Exhibits

194 Exhibit 1, as far as material here, contains an alphabetical arrangement of the names, addresses and occupations of the jury venire for the United States District Court, District of Utah, for the years 1944, 1945 and 1946:

Year	Membership
1944	367
1945	329
1946	130
Total	826

(Clerk's Note: Original exhibit filed in U. S. District Court June 18, 1946.)

Exhibits 2 to 67, both numbers inclusive, are affidavits of Labor Officials, and as far as material here are as follows:

Exhibit 2.

Utah State Industrial Union Council.
Office 23 East First South St.
Salt Lake City 1, Utah, June 12, 1946.

To Whom It May Concern:

We, the undersigned officials of the CIO Unions in the state of Utah, have carefully examined a compilation of names, listed alphabetically, and addresses contained in a document entitled, "Jury Venire for the years 1944, 1945, 1946, United States District Court of Utah", consisting of the title page and fifteen other pages.

195 We have checked the names and addresses very carefully against the Union membership roll and find that during the three years of 1944, 1945, and 1946, the only persons whose names appear on the said jury list and upon the rolls of CIO membership are:

Howard Higbee, Cedar City)
Sam M. Gentry, Cedar City) These three are members of United Steelworkers, Local 2751.
Ray L. Jensen, Cedar City)

Claude Bills, Salt Lake City

Richard Westmoreland, Salt Lake City

These two are members of the United Office and Professional Workers, Local 149.

Clinton Cherrick, Bingham Canyon

Mr. Cherrick is a member of the Mine, Mill, and Smelter Workers, Local 485.

The CIO represents the following local unions within the state of Utah:

Local Union #2	Local Union #151
Local Union #55	Local Union #331
Local Union #65	Local Union #347
Local Union #91	Local Union #354
Local Union #99	Local Union #364
Local Union #392	Local Union #376
Local Union #395	Local Union #487
Local Union #401	Local Union #517
Local Union #431	Local Union #526
Local Union #485	Local Union #640
Local Union #692	Local Union #658
Local Union #621	Local Union #644
Local Union #643	Local Union #820
Local Union #824	Local Union #286
Local Union #159	Local Union #374
Local Union #686-P	Local Union #1577
Local Union #1881	Local Union #2164
Local Union #2751	Local Union #3266
Local Union #3490	Local Union #3503
Local Union #3622	Local Union #966
Local Union #757	Local Union #781
Local Union #962	Local Union #872
Local Union #410	Local Union #782
Local Union #995	Local Union #1179
Local Union #1434	Local Union #1641
Local Union #1445	

196 These locals have a total membership of approximately 10,000 for 1944; 10,000 for 1945; and 10,000 for 1946.

CLARENCE L. PALMER, President, Utah State CIO Unions.

J. FRANK MARBLE, President, District Union No. Two, IUMMSW.

.....

Varro C. Jones, Director, District No. 39, USA.

joe uopwa #149

Subscribed and sworn to before me this 14th day of June, 1946. G. Leon Christensen, Notary Public. Residing at Salt Lake City, Utah. My Commission expires Oct. 27, 1947.

Filed in United States District Court June 18, 1946.

Exhibit 3. Affidavit.

State of Utah, County of Salt Lake, ss.

Otto John Kelley, being first duly sworn on oath deposes and says:

That he is the Chief Engr. of the Salt Desert Divn. 846 B of L. E. and that as such official, he has custody of the official records and membership lists of the said Divn. 846 for the years 1944, 1945, 1946 and that he has examined a compilation of names, listed alphabetically, and addresses contained in a document entitled: Jury Venire for the
for the years 1944, 1945, 1946, United States District
197 - Court of Utah, consisting of the title page and 15 other pages, and that the only persons whose names appear on said compilation who have ever belonged to the above labor organization during any of the three years mentioned are: None

Affiant further states that during the years 1944, 1945, and up to the present time in 1946 there were paid active members in the above labor organization as follows: 1944 30, 1945 36, 1946 37.

Further affiant sayeth not.

(Duly signed and verified.)

Exhibits 4 to 67, both numbers inclusive, are on the same forms as Exhibit 3;

Exhibit 4, Affidavit, Carpenters Local 1498, Provo, Utah, Membership: 1944 1111, 1945 766, 1946 421. Members called to jury duty: 1944 None, 945 None, 1946 None.

Exhibit 5, Affidavit, International Hod Carriers Building and Common Laborers Union of America, Local 206, Ogden, Utah, Membership: 1944 800, 1945 800, 1946 450. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 6, Affidavit, S. U. of N. A. Lodge #279, Ogden, Utah, Membership: 1944 250, 1945 85, 1946 50. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 7, Affidavit, Ogden Lodge 1429 I. A. of M., Ogden, Utah, Membership: 1944 360, 1945 350, 1946 325. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 8, Affidavit, Wasatch Division 124 O. R. C., Lodge 124, Ogden, Utah, Membership: 1944 156, 1945 150, 1946 123. Members called to jury duty: 1944 None, 1945 None, 1946 None.

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198 Exhibit 9, Affidavit, Brotherhood of R. R. Carmen, Lodge 548, Ogden, Utah, Membership: 1944 218, 1945 254, 1946 254. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 10, Affidavit, B. of L. E. Division No. 55, Lodge 55, Ogden, Utah, Membership: 1944 175, 1945 212, 1946 212. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 11, Affidavit, Culinary Alliance, Local #599, Ogden, Utah, Membership: 1944 235, 1945 225, 1946 240. Members called to jury duty: 1944 None, 1945 None, 1946 2.

Exhibit 12, Affidavit, I. B. E. W. 217, Local 217, Ogden, Utah, Membership: 1944 40, 1945 60, 1946 60. Members called to jury duty: 1944 None, 1945 None, 1946 one.

Exhibit 13, Affidavit, I. B. U. A. 53, Barbers 53, Ogden, Utah, Membership: 1944 40, 1945 39, 1946 44. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 14, Affidavit, B. R. C. of A. Lodge #635, Carmen and Helpers, Ogden, Utah, Membership: 1944 94, 1945 100, 1946 85. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 15, Affidavit, I. B. of F. & O. Local #995, Ogden, Utah, Membership: 1944 40, 1945 45, 1946 45. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 16, Affidavit, B. M. W. E. Local 1227, Ogden, Utah, Membership: 1944 30, 1945 40, 1946 53. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 17, Affidavit, Laundry Workers Lodge 58, Ogden, Utah, Membership: 1944 37, 1945 40, 1946 60. Members called to jury duty: 1944 None, 1945 None, 1946 None.

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199 Exhibit 18, Affidavit, Gateway Lodge, 293 Brotherhood of Railroad Trainmen, Lodge 293, Ogden, Utah, Membership: 1944 220, 1945 230, 1946 240. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 19, Affidavit, B. of L. E. & F. Lodge 98, Ogden, Utah, Membership: 1944 276, 1945 269, 1946 267. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 20, Affidavit, Brotherhood of Loco. Firemen and Eng. (Mount Pilot Lodge 911, Salt Lake City, Utah), Membership: 1944 110, 1945 140, 1946 120. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 21, Affidavit, Bricklayers Union #1 Utah, Salt Lake City, Utah, Membership: 1944 125, 1945 112, 1946 97. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 22, Affidavit, Bakers Local #401, A. F. of L., Salt Lake City, Utah, Membership: 1944 300, 1945 325, 1946 350. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 23, Affidavit, B. of L. F. & E., Rio Grande 670, Salt Lake City, Utah, Membership: 1944 50, 1945 50, 1946 37. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 24, Affidavit, International Association of Mach. Dist. 114, Salt Lake City, Utah, Membership: 1944 1000, 1945 900, 1946 950. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 25, Affidavit, Magna Div. #506, Order Ry. Conductors, Magna, Utah, Membership: 1944 75, 1945 80, 1946 85. Members called to jury duty: 1944 None, 1945 None, 1946 None.

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200 Exhibit 26, Affidavit, Ute Lodge #157 Switchmen's Union of North America, Ute Lodge #157, Salt Lake City, Utah, Membership: 1944 118 members, 1945 116 members, 1946 106 members. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 27, Affidavit, Brotherhood of Loco. Firemen & Enginemen Lodge 670, Salt Lake City, Utah, Membership: 1944 375, 1945 380, 1946 370. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 28, Affidavit, Hotel & Rest. Empl. Alliance, Salt Lake City, Utah, Membership: 1944 100, 1945 100, 1946 350. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 29, Affidavit, Order Railway Condrs. Division 395, Salt Lake City, Utah, Membership: 1944 275, 1945 290, 1946 283. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 30, Affidavit, B. of L. F. and E., Lodge #911, Salt Lake City, Utah, Membership: 1944 about 140, 1945 86, 1946 85. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 31, Affidavit, Local Lodge 178 of the B. of L. F. & E., Salt Lake City, Utah, Membership: 1944 146 members, 1945 154 members, 1946 134 members. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 32, Affidavit, Brotherhood of Railway Carmen of America, Local 83, Salt Lake City, Utah, Membership: 1944 236, 1945 248, 1946 260. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 33, Affidavit, Brotherhood of Railroad Trainmen, Local 905, Salt Lake City, Utah, Membership: 1944 79, 1945 79, 1946 81. Members called to jury duty: 1944 None, 1945 None, 1946 None.

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201 Exhibit 34, Affidavit, Brotherhood of Railroad Trainmen Wasatch Lodge 471, Salt Lake City, Utah, Membership: 1944 390, 1945 384, 1946 366. Members called to jury duty: 1944, 1945, 1946 one (year not given).

Exhibit 35, Affidavit, Sheet Metal Workers' Internat'l Ass'n., Local Union No. 312, Salt Lake City, Utah, Membership: 1944 None, 1945 None, 1946 None. Members called to jury duty: 1944 One hundred and twenty, 1945 One hundred and ten, 1946 One Hundred.

Exhibit 36, Affidavit, Operating Engineers Local #3,—A. F. of L., Salt Lake City, Utah, Membership: 1944 1,500, 1945 800, 1946 650. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 37, Affidavit, Bridge and Structural Iron Workers Local 27, Salt Lake City, Utah, Membership: 1944 500, 1945 400, 1946 350. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 38, Affidavit, Ogden Lodge No. 68 Brotherhood of Railroad Trainmen, Ogden, Utah, Membership: 1944 415, 1945 474, 1946 532. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 39, Affidavit, Construction & General Laborers Union Local #79, Salt Lake City, Utah, Membership: 1944 400, 1945 450, 1946 600. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 40, Affidavit, Brotherhood of Railway Clerks, Salt Lake City Lodge #79, Salt Lake City, Utah, Membership: 1944 315; 1945 340, 1946 329. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 41, Affidavit, Carbon County Central Labor Union, Price, Carbon County, Utah, Membership: 1944 800, 1945 500, 1946 400. Members called to jury duty: 1944 None, 1945 None, 1946 None.

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202 Exhibit 42, Affidavit, Mountain States Federation of Tel. Workers, Utah Division, Salt Lake City, Utah, Membership: 1944 379 Members, 1945 387 Members, 1946 606 Members. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 43, Affidavit, Division 730, O. R. C. Pullmen System, Salt Lake City, Utah, Membership: 1944 8, 1945 17, 1946 27. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 44 Affidavit, Carbon County Miners Executive Council, Carbon County, Utah, Membership: 1944 3500, 1945 3500, 1946 3500. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 45, Affidavit, Brewery Workers 325, Ogden, Utah, Membership: 1944 50, 1945 50, 1946 54. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 46, Affidavit, Carpenters 1767, Logan, Utah, Membership: 1944 100, 1945 100, 1946 102. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 47, Affidavit, F. H. B. C. & L. #365, Logan, Utah, Membership: 1944 52, 1945 32, 1946 37. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 48, Affidavit, Local #418, Motor Coach Operators, Ogden, Utah, Membership: 1944 50, 1945 50, 1946 50. Members called to jury duty: 1944 None, 1945 None, 1946 One.

Exhibit 49, Affidavit, Grain Elev. Flour & Feed Mill Union #19873, Ogden, Utah, Membership: 1944 140 members, 1945 140 members, 1946 140 members. Members called to jury duty: 1944 None, 1945 None, 1946 None.

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203 Exhibit 50, Affidavit, B. R. C. of A. #428, Ogden, Utah, Membership: 1944 80, 1945 105, 1946 80. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 51, Affidavit, Boiler Makers Local #198, Ogden, Utah, Membership: 1944 112, 1945 146, 1946 115. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 52, Affidavit, Brotherhood of Railway Clerks, Lodge #641, Ogden, Utah. Membership: 1944 525, 1945 535, 1946 550. Members called to jury duty: 1944 None, 1945 One, 1946 None.

Exhibit 53, Affidavit, Int. Brotherhood of Firemen and Oilers #814, Ogden, Utah, Membership: 1944 12, 1945 12, 1946 12. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 54, Affidavit, A. M. C. & B. W. of N. A. #637, Ogden, Utah, Membership: 1944 150, 1945 175, 1946 190. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 55, Affidavit, Sheet Metal Workers Local 378, Ogden, Utah, Membership: 1944 70, 1945 71, 1946 73. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 56, Affidavit, Carpenters Local 450, Ogden, Utah, Membership: 1945 Three Hundred and eight, 1946 three hundred twenty. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 57, Affidavit, Plumbers and Steam Fitters Local 415, Ogden, Utah, Membership: 1944 150, 1945 150, 1946 75. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 58, Affiadavit, Brotherhood of Railroad Trainmen, Lodge 941, Salt Lake City, Utah; Membership: 1944 600, 1945 650, 1946 575. Members called to jury duty: 1944 None, 1945 None, 1946 None.

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204 Exhibit 59, Affidavit, Operating Engineers' Local No. 3, Provo, Utah, Membership: 1944 500, 1945 400, 1946 300. Members called to Jury duty: 1944 None, 1945 None, 1946 none.

Exhibit 60, Affidavit, Local 23589, Geneva Steel Workers, State of Utah, Provo, Utah, Membership: 1944 600, 1945 700, 1946 200. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 61, Affidavit, International Assoc. of Machinists Lodge 1066, Provo, Utah, Membership: 1944 475, 1945 350, 1946 345. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 62, Affidavit, B. P. D. & P. H. of America, Painters Local #22, Ogden, Utah, Membership: 1944 150, 1945 150, 1946 84. Members called to jury duty: 1944, 1945, 1946: one (year not given).

Exhibit 63, Affidavit, Teamsters and Chauffeurs Union Local #222, Salt Lake City, Utah, Membership: 1944 1200, 1945 1500, 1946 2000. Members called to jury duty: 1944 none, 1945 one, 1946 none.

Exhibit 64, Affidavit, Local Union No. 184, Salt Lake City, Utah, Membership: 1944 911, 1945 785, 1946 891. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 65, Affidavit, Meat Cutters #537 of A. M. C. & B. W. of N. A., Salt Lake City, Utah, Membership: 1944

400, 1945 400, 1946 500. Members called to jury duty: 1944, 1945, 1946 one (year not given).

Exhibit 66, Affidavit, Brotherhood of Railway & Steamship Clerks Local 2018, Salt Lake City, Utah, Membership: 1944 136, 1945 139, 1946 450. Members called to jury duty: 1944 None, 1945 None, 1946 None.

Exhibit 67, Affidavit, Wasatch Div. #222, B. of L. E., Salt Lake City, Utah, Membership: 1944 100, 1945 115, 1946 110. Members called to Jury Duty: 1944 None, 945 None, 1946 None.

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205 Note by Clerk: Foregoing Summary of Affidavits filed in U. S. District Court September 30, 1946. Original affidavits, attached to Affidavit of Parnell Black, were filed in U. S. District Court on June 18, 1946.

Minute Entry—June 21, 1946.

252 On this 21st day of June, 1946, plaintiffs appearing by Parnell Black and Brigham E. Roberts, their attorneys, and defendant appearing by Paul H. Ray and Grant Aadnesen, its attorneys, and this case came on for hearing on motion for new trial, motion by defendant to strike amended motion for new trial for reason it was not filed within time, and motion by defendant to strike paragraphs 16, 17, and 18 and 19, from amended motion. V. P. Ahlstrom, Clerk of the United States District Court for the District of Utah, and William G. Hampton, Jury Commissioner for the United States District Court for the District of Utah, were sworn and examined regarding method of selecting jurors. The court heard the arguments of counsel on motion for new trial, and said motion for new trial was denied.

Notice of Appeal.

253 Notice is hereby given that Jackie Packer Francis, a minor, Dennis Ray Francis, a minor, and James Brent Francis, a minor, by and through their general guardians, Ray E. Francis and Virgil O. Packer, plaintiffs above named, hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the final judgment entered in this action on the 2nd day of May, 1946 and which said judgment became final for the purposes of appeal on the 21st day of June, 1946, at which time the plaintiffs' motion for a new trial was denied by the above entitled Court.

Dated this 17th day of September, A. D. 1946.

CALVIN W. RAWLINGS,
HAROLD E. WALLACE,
PARNELL BLACK,
BRIGHAM E. ROBERTS.

Filed in United States District Court, September 17, 1946.

Summary of Bond on Appeal.

Undertaking on appeal in the sum of $250.00, American Surety Company of New York, surety, filed in U. S. District Court September 17, 1946.

Definite Statement of Points Upon Which Appellants Intend to Rely.

254 Appellants intend to rely upon the following points:

I.

The Court erred in denying and overruling Plaintiffs' Motion to Strike.

II.

The Court erred in overruling Plaintiffs' objection to certain hypothetical questions addressed by counsel for defendant to the witness Ogilvie, all as appears on pages 345,

346, 347 and 348 of the official report of proceedings before the United States District Court in the above case.

III.

Insufficiency of the evidence to justify the verdict.

IV.

The verdict is against the weight of the evidence.

V.

The verdict is against the law and the evidence.

VI.

That under the pleadings and all of the evidence in the case the verdict should be in favor of the appellants.

VII.

That the Court erred in failing and refusing to comply with Rule 51 of the Rules of Civil Procedure, in that the Court failed and refused to inform counsel of its proposed action upon requested instructions prior to the arguments to the jury.

VIII.

That plaintiffs were not given a trial before a fair and impartial jury drawn from a cross-section of the community.

IX.

That the venire, from which the jury which tried plaintiffs' case was drawn, was not drawn from a cross-section of the community.

X.

255 That the Court officials, who drew the venire from which the jury which tried plaintiffs' case was drawn, systematically and intentionally excluded members of organized labor and laboring people, which class of people constituted a large and important segment of the citizenry of the State of Utah.

XI.

That the Court officials, who selected the venire from which the jury here was drawn, purposely selected mostly

business executives, or those having the employers' viewpoint, thus giving a majority representation to one class or occupation and discriminating against other occupations and classes.

XII.

The Court erred in instructing the jury that the defendant by the free pass was exonerated and released from liability for failure to use ordinary care.

XIII.

The Court erred in refusing to give plaintiffs' requested Instruction No. 1.

XIV.

The Court erred in refusing to give plaintiffs' requested Instruction No. 2.

XV.

Misconduct of the jury in returning a so-called "side verdict" giving one of its members two pounds of butter to be mailed to the judge.

XVI.

The verdict rendered herein in favor of the defendant was contrary to the Court's Instructions.

XVII.

That the Court committed error in its charge to the jury in that the instructions were so confusing, uncertain, unintelligible and misleading as not to state correctly the
256 controlling principles of law applicable to the facts in the case and the entire charge of the Court with reference to controlling principles was confusing, contradictory, unintelligible and misleading so that no exception could be taken thereto and the defects and errors therein could not possibly be remedied except by new and different charge.

XVIII.

That the Court committed error in its instructions to the jury and misdirected the jury as to the law applicable to this case.

XIX.

The Court committed error in denying plaintiffs' Motion for a New Trial.

Dated this 25th day of September, A. D. 1946.

CALVIN W. RAWLINGS,
HAROLD E. WALLACE,
PARNELL BLACK,
B. E. ROBERTS,
Attorneys for Appellants.

Received copy of the foregoing this 25th day of September, A. D. 1946.

PAUL H. RAY,
S. J. QUINNEY,
GRANT C. AADNESEN,
Attorneys for Appellee.

Filed in U. S. District Court September 26, 1946.

Stipulation Consolidating Cases and Abbreviating Record.

Inasmuch as each of the above entitled actions arose out of the same accident and the two actions involve common questions of law and fact, It Is Stipulated and Agreed
257 by and between the parties hereto, through their respective undersigned counsel, that such actions may be consolidated upon appeal and may be heard and submitted together in the Circuit Court of Appeals upon one printed record and upon one set of briefs.

It Is Further Stipulated that cause, Civil No. 906, will be presented on appeal to the United States Circuit Court of Appeals, for the Tenth Circuit, and that the appeal on Civil No. 907 will be held in abeyance, and that whatever judgment or order is eventually made and entered by the Circuit Court of Appeals for the Tenth Circuit, in Civil No. 906 shall be made and entered in Civil No. 907.

Inasmuch as Plaintiffs' Exhibit 1 is a large map and of such nature and character that it cannot be accurately reproduced in the printed record, It Is Further Stipulated

that the Court may make and enter its order herein directing the Clerk to transmit said Exhibit 1 to the Clerk of the Circuit Court of Appeals of the Tenth Circuit for use by either or both parties upon appeal, with the same force and effect as though said exhibit had been reproduced and attached to the printed record.

It Is Further Stipulated that upon appeal either party may in his or its brief refer to said exhibit and quote therefrom, with the same force and effect as though said exhibit had been copied or reproduced in the printed record or attached thereto.

Dated this 25th day of September, A. D. 1946.

CALVIN W. RAWLINGS,
HAROLD E. WALLACE,
PARNELL BLACK,
B. E. ROBERTS,
Attorneys for Appellants.

PAUL H. RAY,
S. J. QUINNEY,
GRANT C. AADNESEN,
Attorneys for Appellee.

Filed in U. S. District Court September 26, 1946.

Designation of Contents of Record on Appeal.

258 Come now the appellants above named and designate the following portions of the record, proceedings and evidence to be contained in the Record on Appeal in the above entitled case, to-wit:

1. Complaint.
2. Answer.
3. Motion to Strike.
4. Minute Order of January 31, 1946.
5. Stipulation, dated March 13, 1946.
6. Order, dated March 13, 1946.

7. Order, dated April 1, 1946.

8. Pretrial Order and Stipulation.

9. Condensed Narative Statement of the Testimony adduced and proceedings conducted at the trial, including material portions of Exhibits set forth therein.

10. Plaintiffs' Requested Instructions numbered 1 to 8, both numbers inclusive.

11. Verdict of the jury.

12. Judgment on Verdict.

13. Motion for New Trial.

14. Amended Motion for New Trial.

15. Affidavit of Parnell Black in support of Motion for New Trial and Condensation of Exhibits referred to and made a part of said Motion for New Trial.

16. Narrative Statement of proceedings at the hearing on Plaintiffs' Motion for New Trial.

17. Minute Entry of June 21, 1946.

18. Notice of Appeal.

19. Clerk's Notation on Cost Bond.

20. Statement of Points on which Appellants intend to rely.

21. Stipulation Consolidating Cases and Abbreviating Records.

22. This Designation.

23. Clerk's Certificate.

Dated this 25th day of September, A. D. 1946.

CALVIN W. RAWLINGS,
HAROLD E. WALLACE,
PARNELL BLACK,
B. E. ROBERTS,
Attorneys for Appellants.

[Appellee's Objections to Certain Portions of Appellants' Designation.]

259 Come Now counsel for the appellee and acknowledges receipt of copy of the foregoing Designation of Contents of the Record on Appeal, together with a true copy of each and every portion of the record as mentioned under Items numbered from 1 to 21, both numbers inclusive.

Counsel for appellee object to the inclusion in the Record on Appeal of matters included in Item No. 10, particularly upon the ground that Item No. 10 relates to the Requested Instructions numbered 1 to 8 and no exception was taken by appellants to the refusal of the court to give any of said requested instructions except numbers 1 and 2.

Counsel for appellee object to the inclusion in the Record on Appeal of matters mentioned under Items No. 13, 14, 15 and 16, and to each of said Items separately. Particularly, objection is made to the inclusion of Item No. 14 upon the ground that the Amended Motion for a New Trial was filed after the time permitting the filing of such motion by the Rules of Civil Procedure and that said Amended Motion for New Trial was not properly before the trial court and is, therefore, not properly a part of the Record on Appeal. Counsel for Appellee particularly
260 object to matters included within Item No. 15 upon the ground that the Affidavit of Parnell Black and supporting affidavits and documents were not filed within the time required by the Rules of Civil Procedure and were not properly before the trial court and are not properly a part of the Record on Appeal. Counsel for appellee particularly object to the matters included in Item No. 16 upon the ground that said matters are immaterial and irrelevant and were not properly before the trial court and are not properly a part of the Record on Appeal. Particularly, counsel for appellee further object to the inclusion in the Record of oral arguments made by counsel on the Motion for New Trial upon the ground that said arguments are not properly a part of the Record on Appeal and simply encumber the Record in violation of Rule 75(e). Counsel for appellee do now hereby reserve each and every objection it may have with respect to said matters or any of them, and in particular, any objections which it may have with refer-

ence to the propriety of the Amendment of Motion for New Trial and Affidavits in support thereof, and all of them, and likewise reserves any objection which it may have with respect to the competency of said matters either upon this appeal or upon the Motion or Amended Motion for New Trial.

Without waiving any of said objections but particularly reserving each and all of them, and reserving the right to move the Circuit Court of Appeals to strike all of said items from the Record, appellee agrees that the above and foregoing Record may be considered as the Record on Appeal.

Dated this 25th day of September, A. D. 1946.

PAUL H. RAY,
S. J. QUINNEY,
GRANT C. AADNESEN,
Attorneys for Appellee.

Filed in U. S. District Court September 26, 1946.

Order.

261 Upon application of the plaintiffs in the above entitled case and it appearing to the Court that Exhibit 1 in said case is a large map which, because of its size, cannot be accurately set forth in the printed record on appeal and it appearing to the Court that the original Exhibit 1 should be sent to the United States Circuit Court of Appeals for the Tenth Circuit in lieu of copies thereof and it further appearing that the parties have stipulated that said exhibit may be so sent to said Court, Now Therefore,

It Is Hereby Ordered that the original Exhibit 1 be sent by the Clerk of this Court to the United States Circuit Court of Appeals for the Tenth Circuit.

Dated this 21st day of October, A. D. 1946.

TILLMAN D. JOHNSON, Judge.

Filed in U. S. District Court October 21, 1946.

Statement of Evidence and Proceedings at the Trial.

15 Be It Remembered, that this case came on for trial before the court and jury, at 10:00 A. M. on the 26th day of April, 1946, Parnell Black and Brigham E. Roberts representing the plaintiffs and Paul H. Ray and Grant C. Aadnesen representing the defendant. The following proceedings were had:

The Court: Are you gentlemen ready for trial in this case?

Mr. Black: Your Honor, we are not ready to try it: we are ready to get the jury.

The Court: Well, we will proceed then to get a jury. Call a jury. As your names are called take your places in the jury box.

Clerk: Parley N. Winn, Thornton D. Morris, Percy B. Wright, Oliver H. Brown, Kenneth K. Leonardson, Jack Pogue, Marjorie McMurrin, Theron R. Covey, Margery A. Sabin, Carl W. Huhl, O. Guy Cardon, Lourie A. Bennett, Lily M. Husbands, Vesta Cahoon, William Evans, Jr., Ray S. Burch, M. L. Jones, O. Early House.

Will the jurors please rise and be sworn.

(Above named jurors sworn to answer questions.)

The Court: You have been called in the box to try two cases which have been consolidated for the purpose of trial, and these suits are brought by three minor children—what are the ages of these children?

Mr. Black: 7, 5 and 3 at this time; the little boy may be four, I am not quite sure whether he is four or not.

The Court: And they are brought by and through their general guardian. The suits are the result of a railroad accident which I suppose most of you read about, on the Southern Pacific railroad just out of Ogden a few miles, which as you remember occurred in—what date was that?

Mr. Black: December 31, 1944.

The Court: The last day of the year in 1944. In that railroad accident the parents of these children were killed, both father and mother. They were traveling on one of the trains, the front train I believe—

Mr. Black: First 21, your Honor, the last car.

The Court: And they were killed in that accident, and this suit is brought by the minors through their guardian to recover damages on account of the death of these two parents.

I suppose most of you, may be all of you, read about that accident at the time it occurred, did you not: Hold up your hands. Most of you did.

16 Any of you know anything about it except what you read in the newspaper? You do?

A Juror: Yes, sir. (Mrs. Sabin.)

The Court: What information have you about it, other than newspaper write-ups?

Juror Sabin: Well, my husband works for the Southern Pacific Railroad, an engineer.

The Court: And he told you about it?

Juror Sabin: Well, naturally in conversation that has been discussed; however, it is just hearsay.

The Court: Did he tell you so you would have any opinion about it one way or the other?

Juror Sabin: Well, not from what he told me, none particularly.

Mr. Ray: May I inquire what the lady's name is?

Mr. Black: Mrs. Sabin I think.

17 The Court: From that talk and from the newspapers have you now an opinion about the merits of this case and the liability or the lack of liability of the defendant company?

Juror Sabin: Well, I would like to say I think I would be prejudiced inasmuch as—I think I would be prejudiced,

your Honor, inasmuch as my husband is employed by the Southern Pacific Railroad; my father was a retired engineer of the Southern Pacific Railroad, and I worked for them.

The Court: Did you ever work for the railroad yourself?

Juror Sabin: Yes, sir.

The Court: Well, do you think you have got such an opinion by reason of these relationships that you might be prejudiced and could not return a fair and imparital verdict?

Juror Sabin: Well, I think, from my understanding of the case and the opinion I have formed, I probably would be—

The Court: You don't have to tell me what your opinion might be if you have got one. I am only interested in knowing whether or not you have such an opinion. You think your opinion might be such, or bias or prejudice might be such that you might have an opinion, say, as to the nonliability or the liability, and if you had an opinion, then as to that liability your situation and your prejudice and bias might be such it would affect your judgment as to the recovery do you think that might be true? Is there any probability of that that you have in mind?

Juror Sabin: Well, I think so, your Honor.

The Court: You don't think you could make a good juror?

Juror Sabin: No, sir, I don't think I could.

The Court: Well, do you want to challenge her, either one of you?

Mr. Black: We will challenge the juror for cause, your Honor.

The Court: Call another juror.

Clerk: Horace Mullins.

(Sworn to answer questions.)

The Court: You read about these cases, did you, in the newspapers when this accident occurred?

Juror Mullins: I think so, yes, sir.

The Court: Did you form or express any opinion about the liability of the company, or have you such an opinion now, with respect to this particular case as I have told you what it was?

18 Juror Mullins: No, sir.

The Court: What?

Juror Mullins: No, sir.

The Court: You haven't got any opinion? You think you could be fair and impartial and disregard anything that you have read or heard?

Juror Mullins: Yes, sir.

The Court: Have you heard anything except while in the court room here?

Juror Mullins: No, only what I read.

The Court: All you know about it is just what you read in the newspaper?

Juror Mullins: Yes, sir.

The Court: Any of you in the employment of any railroad company? None of you.

Have you ever been employed by a railroad company? This gentleman (indicating) first.

A Juror: I was on a section gang, Your Honor.

The Court: How long ago?

Juror: About twenty years ago—23 years old.

The Court: For what railroad?

Juror: Union Pacific.

The Court: What have you been engaged at since?

Juror: I have been in the security business.

The Court: Well, how much experience did you have at that?

Juror: On the railroad?

The Court: Yes.

Juror: Just summer's work, Your Honor.

The Court: Just one summer?

Juror: Two summers.

The Court: Well, would that experience, that engagement, affect your judgment in this case at all?

Juror: No, sir.

The Court: The other gentleman—what was your employment?

A Juror: 46 years ago I worked for the Chesapeake and Ohio Railroad in Cincinnati, and the Big-Four Railroad there.

The Court: In what capacity?

Juror: Chief bill clerk.

The Court: How long did you work for them?

19 Juror: Oh, a couple of years.

The Court: How many years ago?

Juror: 46.

The Court: Well, would that experience of yours make any difference in this case?

Juror: Not any.

The Court: Not at all. Anybody else? Well, on the second row, you. (indicating)

Juror: I worked for the New York Central fast freight lines as traffic solicitor before the first World War; I was aiso secretary for Mr. Dare's (?) office of the Rio Grande; that was before the first World War.

The Court: First World War?

Juror: Yes, sir.

The Court: What have you been employed at since?

Juror: I have been in the coal business for the past 20 years.

The Court: Here in Salt Lake?

Juror: Yes, sir, with the Aberdeen Coal Company—Citizens Coal Company.

The Court: Aberdeen Coal Company. Would your experience as an employee of these railroads make any difference in the trial of this case?

Juror: No, sir, it wouldn't.

The Court: As a coal dealer you ship over the railroads of course?

Juror: Yes, sir. All our coal comes in over the Rio Grande.

The Court: Have you had any business at all with the Southern Pacific?

Juror: No. I am on the retail end of it here at Salt Lake.

The Court: You are in the retail business?

Juror: Yes, sir.

The Court: And your railroad engagements would be with those roads that run south?

Juror: Would be with the Rio Grande.

The Court: Well, would that relation or dealings with the Rio Grande Railroad at all affect your judgment or your opinion, do you think, in determining your verdict in this case?

Juror: No, sir, it would not.

The Court: Anybody else had any—yes, you. (indicating)

Juror: 26 years ago I was a baggageman for the Union Pacific; worked two years.

The Court: Running out of Ogden?

20 Juror: No, right here in Salt Lake.

The Court: Running out of Salt Lake. That was for two years?

Juror: Yes, sir.

The Court: What have you been doing since?

Juror: I am working for Brooklawn Creamery Company.

The Court: Who?

Juror: Brooklawn Creamery Company.

The Court: Do they do any shipping?

Juror: Yes, sir.

The Court: Do they ship any over the Southern Pacific?

Juror: No, sir.

The Court: Do you have anything to do in your employment with the Creamery Company with their shipping business?

Juror: Well, just make out bills mostly on truck lines; practically all shipped by truck.

The Court: And you then have no personal contact with railroad men?

Juror: No, sir.

The Court: Would your experience, either your present engagement or your previous baggageman's work on the Union Pacific affect your judgment at all do you think in the trial of this law suit?

Juror: No, your Honor, not at all.

The Court: Anybody else that had any railroad experience?

I will ask you ladies, this lady that was just excused a while ago, said her husband was employed. Any of you ladies, are your husbands or any close relations employed by any railroad company?

Juror: My husband's grandfather and uncles and father have all been railroad men, engineers on the Union Pacific.

The Court: Your husband's father?

Juror: Yes, sir.

The Court: On the Union Pacific?

Juror: Yes, sir.

The Court: What does your husband do now?

Juror: He works for Salt Lake City Corporation.

The Court: Salt Lake what?

Juror: For Salt Lake City, as a clerk in the street department.

The Court: In the street department?

Juror: Yes, sir.

The Court: It does not throw him in contact, so far as you know, with any railroad company?

Juror: No, your Honor.

The Court: Was it his father or your father that was a railroad man?

Juror: His father and his grandfather.

The Court: They are dead now, aren't they?

Juror: Yes.

The Court: That far-away relationship would not make any difference with you, would it?

Juror: No, your Honor.

The Court: Anybody else of you ladies want to make any explanation?

I will ask you men now, because there are a whole lot of women working these days, any of your wives or daughters employed by a railroad company? None of you.

Any of you ever had any actions for damages for personal injury or property injury of any sort, automobile or railroad or any other type? None of you have.

Any of your close relatives or friends, like husbands or wives or children, had any accident that involved a claim for personal injury, either for or against them or you?

Juror: I have, your Honor.

The Court: What about it?

Juror: In 1941 my wife and boy and I were involved in a car accident where the other people sued us. It was, however, settled out of court.

The Court: Whatever settlement was made was made out of court?

Juror: That is right.

The Court: It is rather personal but I will ask you whether your were the receiver or the giver in the settlement?

Juror: I think my insurance company settled with the people as we had a counter suit; I never did know for what amount.

The Court: Would that experience at all, do you think, affect your judgment or your action if you sit as a juror in this case?

Juror: I don't believe so.

The Court: Anybody else want to make any explanation?

Juror: (lady) In 1928, your Honor, we had an auto accident where we were injured, but it was settled out of court.

The Court: Were you the payer in the settlement or the receiver?

Juror: No, we were the receiver; our car was damaged and they replaced it.

The Court: Would that experience affect your judgment at all?

Juror: No, your Honor.

The Court: In the trial of this law suit?

Juror: No.

The Court: Now, in this particular case this suit is brought by these minor children for the death of their parents and it is brought against the defendant Southern

Pacific Company, a railroad company. Would the bare statement of that proposition on that state of facts be sufficient for you, do you think, to return a judgment against the railroad company, or would you be inclined to do it on that bare statement, or do you understand that even though these parents were killed in a railroad accident that it is necessary for you to find that the railroad company in some way was negligent?

You know when you ride on a railroad train the railroad company does not insure your life or insure you against physical injury. It does insure your property if you happen to be shipping by a railroad, but in traveling you are not insured unless you take out insurance. Any of you ever take out travel insurance when you ride on a railroad? Some of you have—quite a few of you—have. You understand those that are insured take out insurance; that you are not insured unless you take it out. So in the trial of this case when it is finally submitted to you you will have to determine it under the law and the evidence in respect to whether the railroad company is liable because of its negligence in some way. We do not know what that may be in this case until we hear the evidence. I don't know and you don't know.

Now, do you feel like, notwithstanding this is a railroad company and these people were traveling on one of its trains, that you can fairly and impartially try the case upon the evidence with respect to its liability, and the instructions of the court as the court shall define what that liability may be, if any? That is your duty if you sit as jurors in this case. It is your duty to determine the facts, whatever they may be, under the evidence. It is the court's duty to tell you what those facts result in. If the court tells you on a certain state of facts the defendant would not be liable, it becomes your duty to accept that and follow it. If it tells you under that state of facts there would be a liability, it is your duty to find those facts, if they are facts, fairly and impartially find them without respect to what the outcome of the law suit might be. In other words, your relation to this case as jurors is one that is objective. You have
23 no personal interest in it. It is your duty to find the facts fairly and impartially and apply the law to the

facts as you find them, whatever the law may be as announced to you by the court.

Do you feel like you can do that? Your silence indicates you think you can. It will be your sworn duty to do so, when you are sworn in this case as jurors.

Are you acquainted with counsel in the case? Mr. Black, you are going to try it, are you?

Mr. Black: Mr. Roberts will be associated with me, your Honor. He is not here this morning; Mr. Brigham E. Roberts, the District Attorney here.

The Court: Mr. Ray over here at the other end of the table will try it for the defendant.

Mr. Ray: Mr. Aadnesen is associated with me in the case.

The Court: Any of you acquainted with either of these gentlemen? Whom do you know?

Juror: I know Calvin Rawlings.

The Court: Well, does he do any business for you?

Juror: Not for me, no.

The Court: Do any business for your company?

Juror: No. I don't remember the exact condition but under the NRA I think the District Court filed a suit under the NRA and it was tried before Judge Schiller's court and I was a witness in that suit, one or two days.

The Court: How long ago was that?

Juror: Oh, I guess eight or nine years, somethink like that. Mr. Rawlings will remember better than I would.

The Court: You wouldn't remember that well enough for it to make any difference, would you?

Juror: Not at all.

The Court: Anybody else have any acquaintanceship?

Juror: I know Mr. Black.

The Court: Did he ever do any business for you?

Juror: No, sir.

The Court: You just know him?

Juror: Just in a casual way.

The Court: In a casual way?

Juror: Yes, sir.

The Court: Your acquaintanceship would not mat-
24 ter in this case?

Juror: No, sir.

The Court: Another man back there.

Juror: I know Mr. Ray and Mr. Rawlings.

The Court: About the same measure of acquaintance-ship, or is it intimate with one or the other?

Juror: No, sir, your Honor, casual acquaintance.

The Court: Just casual?

Juror: Yes, sir.

The Court: Would your acquaintanceship with either of these gentlemen, or both of them, have any tendency to affect your judgment in the trial of this case?

Juror: No, your Honor.

The Court: Somebody else?

Juror: Just casual acquaintance is all, your Honor, with Mr. Ray and Mr. Rawlings.

The Court: Would your acquaintance at all affect your judgment in this case?

Juror: No, sir.

The Court: Did they ever do any business for you?

Juror: No, sir.

The Court: You just know them?

Juror: Yes, sir.

The Court: Association with them at all intimate?

Juror: No.

The Court: It is not.

Juror: Your Honor, I am casually acquainted with Calvin Rawlings. Did you say the other associate was Iverson?

Mr. Ray: Aadnesen; this young man here.

Juror: I don't know him.

The Court: Would your acquaintance with Mr. Rawlings make any difference here?

Juror: No, sir.

The Court: Well, it should not, I will say to you, because lawyers, while they are very necessary in law suits, are not evidence. They talk about it.

Somebody else indicated relationship. Who are you acquainted with?

Juror: I know four of counsel, your Honor; Mr. Brigham E. Roberts, Jr., did you say he was associated? And I know Mr. Black and Mr. Rawlings and Mr. Ray.

The Court: Do you know any of them a little bit
25 better than any of the others?

Juror: I know them all quite well and have done over a period of quite a number of years.

The Court: Do you play golf with them?

Juror: I believe I have with two of them.

The Court: Which two?

Juror: Mr. Black and Mr. Ray.

The Court: Well, they are on opposite sides. Well, I imagine your acquaintance wouldn't make any difference here, would it?

Juror: No, sir, it would not.

The Court: Anybody else have any acquaintanceship with these lawyers?

As far as I can see I have asked everything that seems to

me necessary to be asked. You gentlemen may have some suggestions to make. I will be glad to ask it.

Mr. Black: I am wondering if any of the jurors, your Honor, are holders or owners of any stock of the Southern Pacific.

The Court: I will ask that. Do you own any railroad stocks at all in any railroad? What is your relationship?

Juror: Union Pacific. I don't happen to have any Southern Pacific.

The Court: But you do own some stock in the Union Pacific?

Juror: Yes, sir.

The Court: Anybody else?

Anything else you want to suggest?

Mr. Ray: One question, if the Court please, I would like to learn, with your Honor's permission: Whether any of these gentlemen or ladies ever had any freight claims or claims of business with the Southern Pacific which might influence them at this time? Your Honor spoke of personal injuries. I would like to know if any freight claims.

The Court: You may answer that; you or your companies may be doing business with the Southern Pacific so as to create the relation of creditor and debtor.

What is your relation?

Juror: We have had freight claims through the
26 ZCMI with whom I have employment, but I don't believe that would have any effect.

The Court: Is that personal claims?

Juror: No, sir, that is business claims.

The Court: Business claims of what company?

Juror: ZCMI.

The Court: With the Southern Pacific?

Juror: I believe so.

The Court: Do you have anything to do with that particular branch of the ZCMI business?

Juror: No; I am the manager of one of its wholesale departments and as such I do have.

The Court: Any of these claims or bills in your department?

Juror: I beg your pardon?

The Court: Any of these claims originate in your department, or referred to it?

Juror: Yes, sir.

The Court: So you have some dealings with respect to it?

Juror: Occasionally we do.

The Court: Have you got any of them unsettled at the present time, so far as you know?

Juror: They are all handled ultimately through the traffic department; they originate in our department on shipments.

The Court: You don't know whether any of them are pending or not?

Juror: I do not.

The Court: Any other suggestion any of you men want to make?

Mr. Rawlings: Will your Honor ask whether they are executives in any company or employees of any company which does any substantial shipping over the Southern Pacific.

The Court: If you know you can answer that. That would be answered in the ZCMI case. Other than ZCMI, any other? Probably the ZCMI does business with all these railroads, doesn't it?

Juror: It does.

The Court: Any of the balance of you have any such connection as that?

Mr. Rawlings: Would your Honor inquire of Mrs. Cahoon as to what business her husband is engaged in.

Juror Cahoon: U.S. postal clerk.

27 The Court: Any other suggestion by either of you?

Mr. Rawlings: May we have your Honor's indulgence for a moment. Would your Honor ask this gentleman—I understand he is a salesman living in Kaysville—what company he represents?

The Court: You can answer that.

Juror: Grocery and meat.

The Court: What company?

Juror: Groceries and meat retail; I own it. Grocery and meat retail.

The Court: As far as you know you are not doing any present business with the Southern Pacific?

Juror: No, sir.

The Court: Anything further?

Mr. Rawlings: We pass for cause.

The Court: The reporter just told me you (indicating) held up your hand a while ago.

Juror: Yes, I did.

The Court: What was it about?

Juror: You were inquiring about working for a railroad. 21 years ago I worked for the Chicago & Northwestern handling freight in Chicago, part of one winter.

The Court: How long ago was that?

Juror: 21 years.

The Court: What did you do?

Juror: Handled freight.

The Court: How long did you work for them?

Juror: Part of one winter, maybe a month or so.

The Court: Would that experience at all affect your judgment in the trial of this case as a juror?

Juror: Not at all.

Mr. Rawlings: You are Mr. Huhl, aren't you?

Juror: Jones.

Mr. Rawlings: Would your Honor inquire as to the nature of the business he is engaged in?

The Court: Now?

Mr. Rawlings: Now.

28 The Court: Yes. What do you do?

Juror: Refrigeration.

The Court: Here in Salt Lake?

Juror: For the past ten years.

The Court: Where is your plant?

Juror: In Salt Lake—Bountiful.

The Court: Anything further?

Mr. Rawlings: We pass the jury for cause, your Honor.

Mr. Ray: We do.

The Court: Then you may exercise your challenges.

Mr. Black: Your Honor, one question, is Mr. Mullins the 9th or the 18th juror?

The Court: I don't know.

Mr. Black: He was called and took the place of Mrs. Sabin.

The Clerk: That would be the 9th.

The Court: He would substitute for that.

Mr. Black: On the order of challenge Mr. Mullins would be No. 9 instead of No. 18?

The Clerk: He is No. 9.

Mr. Black: And not 18.

The Clerk: Yes, I have written a new list showing No. 9.

The Court: As your names are called please retire from the jury box.

The Clerk: Thornton D. Morris, Oliver H. Brown, Horace Mullins, O. Guy Cardon, Lily M. Husbands, Ray S. Burch.

The Court: Those of you on the front row take the back seats.

The Clerk: Will the jurors please rise and be sworn.

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29 JAMES H. TURNER, a witness for plaintiffs, testified:

I reside in Oakland, California, and am employed by the Southern Pacific Company as a claims agent. I am acquainted with the accident and disaster that occurred near Ogden, Utah, on the 31st day of December, 1944. I am acquainted with plaintiffs' Exhibit 1, which is a map showing the tracks in the vicinity where the accident occurred. It was drawn and prepared by the Engineering Department of the Southern Pacific Company to scale one inch to 200 feet. The map shows and indicates the point of collision and the block signals in that vicinity and eastward. The point of collision is westward from Ogden and eastward from San Francisco. The tracks run practically east and west. The trains involved in the accident were both westbound from Ogden. The block signals shown on the map are indicated by a post with a flag on them. Block signal 7629 is the one nearest the left hand side of the map and 7639 is the next one to the right or to the east of it. Signal 7649 is the next block signal to the east of 7639, and block signal 7659 is the next signal to the east of 7649.

It was stipulated that the point of collision was 2458 feet westward from block signal 7639 and that the distance between block signals 7649 and 7639 is 5,688 feet and the distance between block signal 7649 and 7659 is 4,509 feet. These distances were written on Exhibit 1 by Mr. Turner with the consent of Court and counsel.

It was further stipulated that the total length of train No. Second 21, including the engine, was 1,168 feet and that the train consisted of a locomotive, 18 baggage cars, a coach and one other car, and that First 21 consisted of a locomotive and 18 cars. The lines indicating the rails and tracks are broken in two places, one to the right and one to the left of mile post 765. That indicates that 3,000 feet of straight track to the right of mile post 765 has been deleted in order to save length of the map and 4,000 feet of straight track to the left of mile post 765 was likewise deleted.

[Plaintiffs' Exhibit 1 is a map showing tracks in the vicinity of locus of accident. The map is of such size that it is not practicable to reproduce copies for insertion in the printed record. Three copies of the exhibit are available for the use of the Court.]

MARTIN H. HERSHBERGER, a witness for plaintiffs, testified:

I reside in Ogden, Utah, and am employed by the Southern Pacific Company as assistant signal supervisor. I supervise the maintenance of the automatic block signal system between Ogden, Utah, and Reno, Nevada.

The collision near Bagley, Utah, which occurred on the 31st day of December, 1944, is within my territory. At that time I was signal inspector working out of San Francisco. I was called to make an investigation of the accident and arrived at the scene at about 3:00 in the afternoon.

I am acquainted with the principles upon which the block signal systems are constructed and operated and as in operation between Ogden, Utah, and Carlin, Nevada, at the time of the accident. The purpose of the block signal system on a railroad is to properly space trains and provide safe operation for trains moving on a double or single track, safe movements in both directions. The system in operation on the tracks in question is a semaphore type signal operated by track circuits and line circuits and the *lime* circuit selected through various track sections to give us the distance that we decide that a signal should control, based on speed and braking distance.

The system used westward from Ogden is built on the overlapping principle. Each signal overlaps the next signal ahead a sufficient distance to provide adequate braking distance. Westward from Ogden the defendant has double tracks, one for east-bound and one for west-bound traffic and they have a block signal system to control the operation of west-bound trains and another separate system to control the operation of east-bound trains.

Q. Will you explain to the jury how this block signal system works, having in mind of course the trackage between Ogden and Carlin, Nevada; just how does the system work?

A. Well, sir, we will first start out—we have track signals which extend about from approximately one-half to three-quarters, maybe a mile in length on each end of each track circuit and on one end of each track circuit is a track battery that feeds electric power to one of the rails, through that rail to the end of the circuit and through electro-magnet called electric relay, and back out to the other rail and back to the battery. Any time the wheels of a train shunts that or connects those two rails together, the current of the battery flows through the rails and that causes the relay to open because it shunts all the current, or practically all of the current out of the relay. Through these track relays we have another circuit we call the line circuit. It starts at some point where we desire the signal to control from and it catches or breaks through each of the track relays between the point where the signal is controlled to the signal itself, and any time one of those relays are opened it opens this line circuit, and the line circuit in turn opens the control circuit for the signal. The signal itself is held in clear position by electro-magnets. When the current is cut off of those electro-magnets by throwing on the line relay, the signal drops to the stop position by gravity.

31 The block signals westward from Little Mountain are approximately one mile apart. The reason for this spacing is to provide adequate braking distance from one signal to the next one, so when trains are following one another they cannot pass the clear signal and still have another train standing or moving within the braking distance of the other train. On these signals there is an arm

extending about 4 feet to the right of a 5 inch pipe hole. The blade is about 7 inches wide on the end and about 6 inches where it is bolted to the casting, and extends at a 90 degree angle or zero degree angle when it is in stop position, and at an angle of 60 degree below the 90 degree or I mean zero degree, when it is in the clear position. It stands about 25 feet above the rail to the center of the blade and about 7 feet to the right of the track in the direction the train is moving. When a train finds the signal in stop position, they must stop immediately or as quickly as possible. Each signal shows a green light when it is indicating proceed, and it shows a red light when it is indicating any position except proceed. In other words, as soon as it is released, there is a green roundel moves from in front of the lamp; then a red light roundel indicates the position from there on at stop. When the arm is in a downward position the light will be green; when the arm is up in stop position, the light will be red, and at any time it is moving from the green position, just as soon as it starts up a little way, then the red roundel covers the lamp and it shows red the rest of the time. After it starts to drop downward from the stop position to the clear position, it shows red until it is 50 degrees below the horizontal position, then it changes to green.

If an engine or car or a train was standing between signal 7629 and 7639, block signals 7639 and 7649 would both be in a stop position, with the arms horizontal and the lights red. If the train was standing over the block 7639, so that the position of the train was between block signal 7629 and 7639 and a position between 7639 and 7649, block signals 7649 and 7659 would be in a stop position, displaying red.

Q. (By Mr. Black. Now, Mr. Hershberger, according to the railroad operating rules what is an engineer required to do when he comes up against a red block?

A. He is supposed to apply the air, close the throttle, apply the air and stop as quickly as possible and before passing the signal if possible. In other words, if the weather is clear and he can see the signal far enough in advance, he stops before he passes the signal. If not, where they have the single-arm signal as in this case, why the

overlap should—or provides protection for any over-run that might be necessary on account of obscured visibility.

32 Q. I see. In other words, if there were a broken rail, we will say, or something of that kind between 7639 and 7629, or a train standing between those two points, then the engineer should stop at 7649 if he could?

A. That is right, yes, sir.

Q. But if he couldn't, he would be required to stop as soon as possible after that?

A. As soon as possible after that.

I arrived at the scene of the accident somewhere around 3:00 o'clock in the afternoon of the day it occurred. At that time I found block signals 7639, 7649 and 7659 in a stop position. It was daylight then but later that evening I checked each light and they were showing red. I made a careful check and was of the opinion that the block signal was working properly and as intended. If there was a train between 7639 and 7629 the two signals in the rear would assume the aspect of the stop position, displaying red.

Cross Examination.

When an engineer first sees a red block it is not necessary for him to go into an emergency. He should make a service application and stop.

I proceeded to the scene of the accident in the hospital train, which train, or one similar, would stand in the block between 39 and 49. As we crossed over and came down the eastward track to the accident, after we arrived at Little Mountain, I watched the signals on the westward track as we approached, and then after my arrival there I walked back and inspected the first two that were involved. Signal 59, as I saw it that afternoon, was activated by something other than the two trains involved in the collision.

LEON A. NICHOLS, a witness for plaintiffs, testified:

I reside in West Weber and am employed by the Southern Pacific Company as signal maintainer and have worked out of Ogden for about 19 years. The wreck of December 31, 1944, occurred in my territory and I had inspected the block

signals in the vicinity of the wreck about a week before the accident occurred and at that time I found the signals to be working properly.

33 I was called to the scene of the accident and arrived at about 6:00 in the morning after it occurred and at that time I found the block signals to be working properly.

(It was here stipulated between counsel that no contention was made but what the signals were working properly at and prior to the time of the collision.)

MARION JUDE, a witness for plaintiffs, testified:

I reside in Ogden, Utah, and am employed as an engineer by the Southern Pacific Company. I have been an engineer for six years. Before that I was a fireman. I have been in engine service 26 years and was working on the early morning of December 31, 1944. I was called for duty at 1:30 A.M. and assigned to work on regular west-bound freight train No. First 581. The train departed from Ogden at about 4:12 A.M., Pacific War Time. It was a double header and I was operating the head engine.

We left a flagman at Ogden by the name of Kopinski. Between Ogden and Bagley we maintained a speed of 40 and 35 miles. As we approached Bagley I noticed block signals Nos. 7649 and 7639. They were in clear position and the light was green. After we passed block signal 7639 a hot guide developed on the second locomotive and the train was brought to a stop. The other engineer remedied the condition and as we went to stop we broke in two, pulled a draw-bar out of a water car. We sent the flagman out by one long and three short blasts of the steam whistle, which required him to go back for the purpose of protecting the train by using a fusee to stop any other train that was coming in our direction. A fusee is a flare, a red light which burns for ten minutes. The hot guide was repaired in about five minutes and I recalled the flagman, then when I started I pulled the draw-bar out and whistled the flagman out again. This was at about 4:35 A.M. After the draw-bar pulled out, we took the second engine to Promontory Point approximately six miles away and then I went back with my

engine to get the train. Before I coupled onto the train the conductor instructed me not to leave, that something had happened. As far as I knew the flagman was still out protecting the rear end of the train. I had never recalled him. My conductor's name was Hunt.

Cross Examination.

34 (It was stipulated between counsel that the freight train First 581 departed from Ogden at 4:10 A.M. Pacific War Time; that First 21 departed at 4:38 A.M. Pacific War Time and Second 21 at 4:50 A.M. Pacific War Time, and that the collision took place at 5:14 A.M. Pacific War Time.)

Direct Examination (Recalled)

I have been in engine service over 26 years and during that time have become well acquainted with the operation of the action of engine brakes, both automatic and independent. The independent brakes control the braking power on the locomotive alone, independent of the automatic air. The automatic is the mechanism that sets the brakes in the whole train. After the air is once set in emergency it is impossible for the engineer to release it and the train is going to be brought to a stop. You wouldn't be able to start it until your air pressure is built up enough in that line from the tank clear out to the end of the train. That is not the situation with any form or kind of service application, you can release them in any position but emergency. I do not know of any way of the brakes being set in heavy service application by a collision such as occurred in Bagley on the morning of December 31, 1944. A collision of that kind would have to set them in emergency.

Recross Examination.

If the collision broke the train line the brakes would automatically set in emergency and even though you sat there and had hold of your service lever there would not be any air to work on as you have no air in the train line.

WILLIAM B. WARE, a witness for plaintiffs, testified:

I reside in Ogden, Utah; and am employed by the Southern Pacific Company as an engineer. I have been in train service 43 years, was promoted to an engineer in 1907 and have been an engineer since that time. I have been on regular passenger since 1937 and was in regular passenger service at the time of the accident.

I was engineer on First 21 and was acquainted with Engineer McDonald, had known him ever since he went to work. I think I had 12 or 14 years more seniority than Engineer McDonald. I was in train service before they installed the block signal out of Ogden. I don't think Mr. McDon-
35 ald was operating an engine before the block signal system was installed, but believe he was a fireman at that time. My recollection is that the location of block signals 7629, 7639, 7649 or 7659 has never been changed since they were installed. I have been passing these block signals on every west-bound run that I have ever made since they were installed.

Q. What is required of engineers operating west-bound a train with reference to observance of block signals?

A. The engineer is supposed to see all block signals and take action accordingly.

Q. Well, what is required with reference to communicating with the fireman?

A. We exchange; if it is a "Clear" signal I tell him and he answers me. If it is on a curve and he sees them before I do he says "Clear signal".

Q. What is an engineer required to do if he passes a block and he doesn't see whether it is green or red and he receives no response from the fireman?

A. He is supposed to stop immediately.

Q. What is required of an engineer if he comes up against a block signal when it is in "Stop" position displaying red?

A. Stop. If you can see it far enough in advance to stop before you pass it you are supposed to do that. If not, stop as soon as possible.

Q. In other words, just as soon as the signal is observed you can go to work to stop the train?

A. Yes, sir.

Q. What use do you ordinarily make of the braking power of your locomotive when you are operating a passenger train and observe a signal in "Stop" position displaying red?

A. Well, I put the brake valve in service position and leave it there until the train stops. I don't make an emergency stop.

Q. In other words, when you come up against your first red block you usually give it a heavy service application?

A. Yes, sir, put it right in service.

The Court: I wish you would explain right there what he means by "service stop" and "emergency stop".

Q. (By Mr. Black) Will you go ahead and ex-
36 plain to the jury just what you mean by service application of air and how you do it.

A. On a service application you bring the brake valve over to service; that starts to set the brake, and I put it over in service and left it there. Any other kind of stop I lap the valve; that stops the brake pressure. In this case I put it over and left it in service until the train stopped.

Mr. Ray: When you say "this case" are you referring to some particular time?

Mr. Black: He is referring to the morning of the accident.

A. Yes; in this case I just put it in service, left it there until the train came to a full stop.

The Court: Let's get rid of this situation now. That means, I supose, it would take a longer time and travel farther on a service stop than it would on emergency stop.

A. Yes, sir.

The Court: If there is anything significant about that distance in this particular case, this is a good time to explain it.

Mr. Black: I agree with your Honor.

Q. Will you tell the Court and jury whether or not there

is a difference in the degree of applying the brakes in a service application.

A. Yes, sir.

Q. Explain that to the jury.

A. It takes a little longer than if you go to emergency, but I knew how far I had to go after I passed that first red signal before I would come up against the other one, so I didn't see it necessary to go to emergency.

Q. What is the difference between a light service application and heavy service application?

A. Well, it takes you longer to stop the train with a light service application. The heavier the application the sooner the train stops.

Q. In other words, by the manipulation of your air valve you can control the reduction of your air pressure, can you not?

A. Yes, sir.

Q. You could set it up for reduction of five pounds or 15, or more?

A. Yes, sir, or 90 pounds.

Q. The greater the reduction, the more braking
37 power you have?

A. Yes, sir, that is the idea.

Q. When making an emergency—

A. You just wipe it right off.

Q. You "big hole" it—let all the air you have got escape in the atmosphere?

A. Yes, sir.

Q. About how much of a service application do you use in bringing a train to an ordinary stop, station stop?

A. Oh, 12 or 15 pounds ordinarily.

Q. Supposing you are going to make a heavy service application, about how much pressure would you release?

A. Well, it all depends on the stop you make.

Q. I mean a heavy service application.

A. Oh, I would use 20 or 25 pounds.

Q. Then in an emergency stop you release everything you have got?

A. Yes, sir, give it all we have.

Q. What is the usual practice as you observe it amongst engineers employed by the Southern Pacific Company in

bringing their passenger trains to a stop when they approach and see a block signal in "stop" position displaying red, about how much air pressure—

Mr. Ray: I think that is an incompetent question, if your Honor please. Object to it on that ground.

Mr. Black: I think he is an expert, your Honor—

The Court: Repeat the question; I was not listening to it in detail.

(Last question read by the reporter.)

The Court: I think probably that is objectionable because he only knows his own practice.

Mr. Black: I asked what he observed with other engineers and his own practice.

The Court: Ask him first whether he has made any observation.

Q. Have you observed other engineers operating Southern Pacific trains in the manner in which they have brought and do bring trains to a stop when they approach a block signal in "stop" position displaying red?

A. No, sir, I can't say that I have.

Q. What has been your own practice in that regard?

A. Well, when I see a red signal I try to stop before
38 I pass it, if it does take a little more air; I never go to emergency because that makes a rough stop, but I use air enough to try to get it stopped before I pass it.

Q. Do you ordinarily use what is known as a heavy service application?

A. Yes, sir, if it is necessary.

Q. When would it be necessary?

A. Well, to keep from passing the signals.

Q. And after—

The Court: He didn't answer that. That would depend on the grade, weight of his train and his speed I would imagine.

Q. (By Mr. Black) What is your practice when you are not able to bring the train to a stop before you pass it?

A. Just as quick as possible.

Q. As quick as possible?
A. Yes, sir.

I was called for service on the morning of December 31st for 4 o'clock out. I reached the change room at 3:30 A.M. and saw Mr. McDonald there at that time. I observed nothing unusual in his appearance; he seemed to be in good spirits. I was in his presence about five or 10 minutes. I boarded the locomotive First 21 at about 4 o'clock. Campbell was my fireman and Kovarik the conductor. We received running orders from Ogden. The trains were run as First and Second 21, Ogden to Montello.

Q. And they were to depart the second 12 minutes after the first?
A. Well, they could depart any time they wanted to; the block signal takes care of that.
Q. Do you depend on the block signal to take care of that?
A. Yes, sir.
Q. How does the block signal take care of it?
A. That spaces the trains for safety.
Q. How does it space the trains for safety?
A. Well, it doesn't allow them to get too close together; it keeps them in back of you.
Q. How far does it keep them apart usually?
A. Well, there are different block signals; some are longer than others, but most of them are about a mile.
Q. And the block signal is supposed to keep them about a couple of miles apart?
A. Yes, sir.

39 We left at 4:38. We picked up Flagman Kopinski who had been left behind by freight train No. First 581. He boarded my engine in Ogden at Cecil Junction. The flagman informed me that First 581 was running ahead of us on our time. We attained the speed of 65 miles at West Weber, which is the usual running time and were making about 65 miles per hour when we reached Little Mountain. I watched the block signals very close and they were all clear. I knew where every one was located by past experience. The arms on the signals were down and the light was gren. When we came up against

block signal 7649 I found it red. I saw it was red when I was very close to it. The weather was foggy but nevertheless I was able to see the block signal. I was not very far, not over five or six car lengths from it when I first saw it. I started to stop right there. I made a heavy service application of air and brought the train to a stop, when it was about a half mile west of the signal. My train consisted of locomotive and 18 passenger and baggage cars. It was the regular pasesnger train. Just as soon as I got the train stopped and released the brakes, I proceeded with caution.

Q. What is meant by the expression "proceed with caution"?

A. Well, to be able to stop before you strike anything or run into an open switch.

Q. Proceed with such speed as you could stop the train right now, is that it?

A. Yes, sir, that is it.

As my engine approached block signal 7639 I observed the freight train flagman there; he had burning fusees and a lantern in his hand. I could see the fusees a little farther than I could the block signals, it was pretty foggy. The flagman was right at the block signal and I noticed the signal was in a stop position, displaying red. I could see the red light. The flagman gave me a stop signal and responsive to the stop signal I slowed right down and he got on the engine. I don't remember what he really did with the fusees. He just got up and told me the train ahead of us had stopped. I have noticed that flagmen hardly ever get on an engine carrying lighted fusees, they usually throw them out on the ground and I have no recollection of this flagman bringing a lighted fusee onto the engine. The flagman told me that his train had stopped up ahead by the section house. After I received that information I proceeded up to the rear of the freight train very slowly, at the rate of 10 or 12 miles per hour I would say. That was about the same speed that I made after I brought the train to a stop responsive to block signal 7649. I proceeded westward and when I got up to where I could see the freight train I just made a move to stop to set the air, when the crash came. It was not such a bad crash, I didn't imagine there was near happened what did; but I

reached for the brake valve. First thing I thought was he had knocked me into the caboose. I was two or three cars from it but I went right to emergency. In the meantime the air had all gone, the collision set the brakes in emergency. It took all of the air right out of the train and that caused the brakes to set immediately. I saw the markers on the rear end of the caboose when I was four or five cars away. These markers consist of two red lights, one on each side of the end of the caboose. It was foggy and as soon as I saw the markers I started to stop. I didn't get to make the application and never set the brakes at all, the air was gone too quickly. When my engine came to rest there was about two car lengths of space between the engine and the rear end of the train.

Cross Examination.

I reached for my brakes before I ever felt the collision. Just at that time they struck me. The brake was useless, the air had escaped into the atmosphere. The air that controls the brakes is under pressure. A service stop is made by the brake valve in the cab of the engine. A heavy application is accomplished by permitting more air to escape and a lighter by less air. When you use the automatic air valve in the engine it *effects* the whole train almost instantly.

When I made the heavy service application at signal 7649 with the automatic air valve, the air brakes were set clear back to the end of the train almost as soon as I gave an application of air with the valve. It *effected* every car in the whole train as well as the engine. When you make a heavy application there is almost an instantaneous brake application throughout the whole train. It is practically as fast with a lighter application. It goes back a little faster when you give it a heavy application. When you make an emergency application it sets all the brakes right now. You get every bit of braking power you have and it reaches
41 the back end instantly. It was not traveling 65 miles per hour when we reached the signal in the "stop" position 7649 as I had slowed down some before that. I was then traveling 55 or 60 miles, in that neighborhood. I gave a heavy application of air and stopped approximately half way between the two signals, but just as soon as I had

reached the dead stop I picked up and proceeded with caution. If I remember right, I said I was traveling 6 or 8 miles an hour when we felt the bump.

After I brought the train to a stop between signals 7649 and 7639 I proceeded with caution, traveling at about 10 or 12 miles per hour until I reached 7639, where I picked up the flagman, and then from there on until we were struck, I traveled at 6 or 8 miles per hour. These are my best estimates.

Redirect Examination.

The bump I mentioned was not a very severe jar on the engine. It was just a jerk and a sudden stop. It was not severe, didn't bump my head.

Q. Mr. Ware, have you ever experienced a situation where a train was moving six or eight miles an hour and the airline was ruptured, or the air was set in emergency from the rear end?

A. Yes, sir.

Q. What effect does that have on the head end?

A. Stops you right now.

Q. Would that be a more severe stop than you experienced at this time?

A. No, it would be practically the same.

Q. Practically the same?

A. Yes, sir.

Q. Would it be a severe stop?

A. Yes, sir, a very quick stop.

Q. How would it compare with the stop you experienced on this occasion?

A. Just practically the same kind of stop. Be emergency in both cases.

When we came around the curve approaching Little Mountain I reduced the speed about 5 miles per hour by use of the automatic brakes. It takes quite a little ways to get up again to the speed of 65 miles per hour after coming around a curve. I don't think I ever regained the speed of 65 miles per hour. Usually we regain the usual speed of 65 miles before we reached block signal 7639.

42 The brake valve is located in the cab of the engine, right to the left of the place where the engineer sits, right in front of him. The throttle is right up over the left hand. The engineer handles the throttle and brake valve with the left hand. The engineer always sits on the right side, and on the morning of the accident as the train was traveling toward Bagley, my view was to the north. The block signals are to the north of the north rail.

Q. Just what motion and movements would you make with your left hand and arm if you were going to handle and operate the throttle or the air brake on your engine? How would you do it?

A. I would set the air brake and reduce the steam pressure.

Q. Just how would you do it?

A. I would reach for the brake valve, set the brake, cut my steam down with the throttle, just like that (indicating).

Q. You would reach above for the throttle after you had operated the air?

A. Yes, sir; you would set your air and cut your steam down; just stop, see.

Q. The movement then would be with your left hand over to set the air?

A. Yes, sir.

Q. And then you would reach up above to take care of the throttle?

A. Yes, sir.

Q. And you would cut your steam off after the brakes had taken hold?

A. You cut it down, yes; have your steam shut off at the time the stop was made, nearly.

Q. You wouldn't cut the steam off all at once?

A. No.

Q. Keep your engine pulling the slack out?

A. Yes, sir

Q. Can't be any question about that?

A. No, sir.

Q. The air first, then you operate the steam next?

A. Yes, sir.

Q. While you were doing that what would you be doing with your right hand? Where would your right hand be usually?

A. I would just have it there in normal position, on that arm-rest may be.

Q. On that arm-rest by the window?

43 A. Yes, sir.

Q. Where with respect to that window is that arm-rest?

A. On the outside.

Q. When that window would be open your right arm would be on the right arm-rest just outside the window, wouldn't it?

A. Yes, sir.

Recross Examination.

The throttle and brake valve are very conveniently located for use by the left hand. Right in front of the engineer's right hand is the reverse lever. It is right there too, right by the brake valve, they are all right together.

Q. And does that work on a quadrant, a notched quadrant also?

A. Yes, sir.

Q. Where do you leave that when you are just going along on a normal run? Where is a good place to have that for a good forward speed?

A. Well, the faster you go the further up you pull them; work them closer you see.

Q. So the time you are going along nicely you have got it up on your quadrant so if you pull it a little bit it would put you in reverse?

A. Oh yes, you get them right up.

Direct Examination—Re-called.

An engineer does not have any more control of his train after there has been an emergency application of the air. When the engineer makes a heavy service application or any other kind of service application he can release his brakes and keep going. But he is powerless to release the brakes if there has been an emergency application and this is true

whether the emergency application has been made by the engineer or by the rupture of the air line somewhere.

Cross Examination.

After the emergency brake is set it must be released, if at all, by a counter-pressure of the valve which requires a building up. Any breaking of the line from one end of the train to the other locks the air in the brake cylinder in emergency. No use might be made of the reverse lever in an effort to stop you, you could put it over but that would just lock your driver wheels too, which would be of little use, if any.

Re-Direct Examination.

We trainmen describe the slack action as the running in or running out of the slack. The slack runs in when the engine is running slower than the rest of your train, and your slack moves out when the engine is moving faster. When you start a train you pull the slack out. When the slack is run in behind the engine we describe that as a slack being bunched up. If a train was moving along at 40, 50, 60 miles an hour and hit the rear end of another train, if they were stretched out there would be slack action but when we hit the train they would go in. That would be just part of the sudden stop that would be caused by that collision. I couldn't tell you exactly, I think there is around four inches slack in these couplers in a passenger train. Four to six inches, I am not sure of that, really.

Re-Cross Examination.

If you had four inches between the cars, then in twenty cars you would have seven or eight feet of slack. And if it is six inches it would be ten or twelve feet of slack. When you stop the engine of the train those cars could not stand out there with the slack in it and the back end would take it up.

LOUIS E. CAMPBELL, a witness called by plaintiffs, testified:

I live in Ogden, Utah and am locomotive fireman employed by the Southern Pacific. I have 3 years and 4 months senior-

ity. I was working on a passenger train on the morning of the accident. Our engine was an oil burner; my duties were to keep up steam and watch the block signals. I watched for block signals that morning but couldn't see very many of them and out around Bagley I couldn't see them at all and the engineer called them to me. I have in mind the location of block signals 7639, 7649 and 7659. It was too foggy to see these signals until the very last one. I saw the one where we picked up the flagman of the freight train. I saw that we were traveling very slow and I saw that signal. I did not see the red block that caused the engineer to stop the train.

Q. What did Mr. Ware say to you when he passed that block?

A. He says: "Red block" and started to using the air.

Q. Before that he had seen "Green blocks" I suppose?

A. Yes.

45 As we were proceeding towards block signal 7639 I could see the flagman with the burning fusees in his hand. I could see the light in the block signal and that it was red. The speed of the train was reduced sufficiently to pick the flagman up. I couldn't say, but I am sure the flagman did not bring the fusees onto the engine. He got up in the cab, talked to the engineer a little bit and mentioned the freight train ahead. We proceeded on very carefully, watching for the slack of the train and saw the caboose and just about that time the collision occurred. It gave us a little shove ahead and then we immediately stopped. I imagine we were shoved ahead about a half car length or more. I thought we might go into the end of the caboose.

Q. Mr. Campbell, would you tell the jury just how the fire is maintained in the fire-box of these locomotives, oil-burning locomotives?

A. They are maintained with a big fire valve you have your blower on. When he has his throttle out you don't have to have the blower; you cut that blower out, but when he starts to stop then you put the blower on so as to give a draft, but as long as he has the throttle out—So when the engineer starts stopping then the fireman has quite a few duties to perform right then.

Q. What are your duties when the engineer starts stopping?

A. Set your fire.

Q. How do you set your fire?

A. Well, if you don't cut your oil down and put your blower on it will smoke and you can't see.

Q. Do you ordinarily put your fire out completely?

A. No, sir, just set a spot fire.

Q. What is a spot fire?

A. Just a slow-burning fire.

Q. The blower mechanism creates a suction?

A. A draft.

Q. Through the box and pulls the smoke out of the firebox so it won't escape into the cab, isn't that true?

A. Yes, sir.

Q. Have you had any instructions with reference to the duties in case of emergency while firing one of these engines?

A. As far as the rule books are concerned I can't say that I have. It is a general practice. I don't get what you mean I guess.

Q. If you are in the presence of what may turn out to be an emergency what are you supposed to do with your fire?

A. Put it out I guess.

46 Q. How do you put it out?

A. You can either shove the valve over, or get off the seat and go back and cut the valve off from the tender.

Q. And that would keep the oil out of the firebox?

A. Yes, sir.

The testimony of MARK E. HARDMAN given through deposition was read into the record.

Mr. Black: Mr. Ray, at this time we desire to read into the record the testimony of Mr. Hardman at the inquest, and any other parts you desire.

Your Honor, there is one witness that is out of the State, Mr. Hardman, who is the fireman.

The Court: One of you take the witness chair and read the answers, and you read the questions. Do you have a

copy of the inquest Mr. Ray? Let Mr. Roberts take the witness stand and read the answers.

Mr. Black: Do you have a copy of the inquest, Mr. Ray?

Mr. Ray: Yes; I had been of the impression we were going to use the testimony at the I&C hearing, and so, if your Honor please, I will want an opportunity as part of the cross examination of this witness to select such parts as I may desire from the other deposition.

Mr. Black: If there are any parts that you introduce in there specially we would like to have the same privilege.

Mr. Ray: Okeh.

Mr. Black: I have only one copy of the inquest, if you have a copy that you can loan me.

The Court: Is it in the record here, one of them?

Mr. Black: No, Your Honor.

This is the testimony if Mark E. Hardman who was sworn as a witness in the inquest held in Weber county on the death of conductor McDonald.

Mr. Ray: Engineer McDonald.

Mr. Black: Engineer McDonald, that is right.

The Court: He was what?

Mr. Roberts: He was the fireman of second 21.

47 My name is Mark E. Hardman. I have resided in Ogden for about 18 years and have been employed a little over two years as a fireman by the Southern Pacific Company and was so employed on the morning of the 31st day of December, 1944, on passenger train No. Second 21. Mr. McDonald was the engineer. This was my first run with him. As I remember, I reported for work at 3:40 A. M. I met Mr. McDonald at about 3:30 A. M. and had a conversation with him in respect to heating the oil, how hot it should be and how I should heat it. The conversation was in the change room before we went onto the engine. I had occasion to observe his demeanor; he seemed to be in good spirits. I boarded the engine at 3:40 A. M., Pacific Time,

and as I remember it, we left Ogden at 4:50. We had received train orders telling us to run as Second 21. There was nothing in the orders referring to the freight which was running ahead of us on the main line.

"Q. Was anything said between yourself and Mr. McDonald, the engineer, about calling the block signals?

"A. Yes, sir.

"Q. State what it was, please.

"A. It was after we got on and reached the fog. I told him I couldn't see the block signals.

"Q. You told him you could not see?

"A. Yes, sir.

"Q. What did he do or say?

"A. He said: "O.K., he would watch"

"Q. Did he proceed to call the block signals from that point on?

"A. Yes, and no.

"Q. When you say "Yes, and no", what does that mean, sir?

"A. Well, when we got to a certain location out there I told him I couldn't see the block signal. Up until that point it hadn't been so foggy but what you could see them.

"Q. Do you recall the point?

"A. Yes, sir.

"Q. Where was that?

"A. East of 'Little Mountain'.

"Q. Did you observe the fog and talk to him about the foggy condition that existed?

"A. Yes, sir.

48 "Q. You stated you told him you couldn't see the 'blocks'?

"A. That is right.

"Q. What did he reply?

"A. "O.K." as I remember about that point.

"Q. Could you estimate, from your observation, what the depth of the fog would be?

"A. No, sir, I couldn't.

"Q. You were conscious, however, it was fog?

"A. Oh, yes.

"Q. Do you have any idea about what time you arrived at Little Mountain?

"A. Oh, I would say or estimate it was somewhere around 5:15, that is just an estimation.

"Q. You have been over the main line a number of times, Mr. Hardman?

"A. Yes, sir.

"Q. You are acquainted and, in your own mind, are you, as to where the block signals are located there?

"A. Yes, sir.

"Q. Are you aware of the distances between them?

"A. Not positive, but I think they are a mile apart.

"Q. That would be your estimation on it?

"A. Yes, sir.

"Q. Were you acquainted with the numbers on the block signals in that area?

"A. No, sir.

"Q. Is there a block signal at Little Mountain?

"A. Yes, sir.

"Q. Where is that in relation to the curve?

"A. One,—east of the curve; one,—right on the curve, and one,—around the point of the curve.

"Q. Assuming, until a witness is competent to testify on that point—assuming that the block signal at Little Mountain is designated as 7669, do you know what block signal I am referring to?

"A. No, sir, but I think that would be the one at the west end of Little Mountain.

"Q. I might state this is the one on the curve.
49 Those block signals are off to the right of the train, are they not?

"A. Yes, sir.

"Q. Do you recall whether Mr. McDonald called the block signal on the curve of Little Mountain?

"A. Not the one on the main curve, he didn't.

"Q. He did not call?

"A. Yes, sir.

"Q. Did you see the block signal?

"A. No, sir, not that one.

"Q. You are not in position to testify as to the position that block signal on the curve was?

"A. No, sir; I am not.

"Q. Now, proceeding west, are you aware as to how many block signals there are between Little Mountain and Bagley?

"A. I think there is three.

"Q. Proceeding west from Little Mountain, and, assuming for the purpose of identification that the next block signal going west from Little Mountain is 7659?

"A. That would be the one that starts on the straight of way?

"Q. That is the one that starts on the straight of way, was that signal called?

"A. I told him again, "I couldn't see the block signal," and he said: "I got her."

"Q. What does that term mean, Mr. Hardman. We are not railroad men. When he repeated "I got her", what does that mean?

"A. Well, it gave me to understand he knew the position of it.

"Q. Did you know the position of it?

"A. No, sir, I couldn't see it.

"Q. Now, continuing west to the next block signal, which, for the purpose of discussion here, I think identified as 7649, was that signal called?

"A. I told him again,—"I couldn't see the block signal" for the simple reason I didn't know definitely in my own mind and I was trying to get him and determine why he wasn't calling the signal 'red' or 'green'.

"Q. Now, you told him at 7649, "you didn't get it".

"A. That is right.

"Q. Did he reply to that?

50 "A. I got her". If I get my block signal numbers straight.

"Q. I didn't get the reply.

"A. I got her," again.

"Q. Now, Mr. Hardman, the next block signal, block signal 7639 is the last one before the point of impact, was it not?

"A. Yes, sir, that is at Bagley.

"Q. That is the one just prior to entering into Bagley?

"A. Yes, sir.
"Q. Was that signal called?
"A. Yes, sir.
"Q. Will you state what the 'call' was, please?
"A. "Red".
"Q. Did you call it, or Mr. McDonald?
"A. I called it.
"Q. "Red"?
"A. Yes, sir.
"Q. Did you get a response from Mr. McDonald?
"A. I couldn't definitely say whether I did or not.
"Q. What is your best judgment on that, as to whether you got a response?
"A. Well, I called it very loud. Exceptionally loud, because I had been in the fog and had seen none of the others for quite a distance, and, for that reason I wanted it to be known that it was 'red'.
"Q. And, in your mind, you are positive that signal was 'red'?
"A. Yes, sir.
"Q. At the time you called that you are not sure you said that you got a response from McDonald?
"A. No, sir, I am not.
"Q. What is your best judgment on that?
"A. Well, I really hate to say on that.
"Q. Well, give us just your judgment, you were the only one there and we cannot decide that. In other words, there is some question in your mind as to whether you did, or did not, get a response, and that is the reason I would like to know.
"A. I don't think he answered, but there was no reason for him not hearing, I don't think. If that is what you wish.
"Q. Certainly, his reply to you at that point was
51 not the same as on the previous two block signals, is that correct?
"A. That is right.
"Q. Did you have occasion at that point to observe Mr. McDonald?
"A. No, sir.
"Q. What were you doing, Mr. Hardman, that time?

"A. Taking care of my duties as fireman. I expected a 'stop' and I was cutting my engine down to meet the requirements of a 'stop'.

"Q. Do you know the rule as to a 'block', you do, do you not?

"A. Yes, sir.

"Q. What is that rule?

"A. 'Stop' on a 'red block'.

"Q. Is there any qualification to that?

"A. You are supposed to make a 'full stop and flag in,' and things of that kind.

"Q. You may state what you did at the point that you observed the 'red block'?

"A. I called the 'red block' and immediately cut my fire down and opened the blower to pick up with the gas adjuster, the atomizer, and cut my feed water pump.

"Q. Can you speculate as to how long those actions would take?

"A. Possibly ten seconds, or more.

"Q. What happened then, Mr. Hardman?

"A. I seen the markers on the train, next.

"Q. The Court: I didn't catch that.

"A. I seen the 'markers on train, First 21'.

"Q. When you say 'markers' those are what?

"A. The 'red lights at the rear end of the train'.

"Q. How far distant were they?

"A. It is kind of hard to judge distances when there is some fog, the fog was lifting, however, at that point, and it is hard to judge the distance.

"Q. Could you do it by car length, are you able to do that?

"A. Not very well, but we had already passed the 'red block signal' then, and I would imagine it was something like, oh: maybe 15 to 20 cars.

52 "Q. What did you do?

"A. I called and told him "We was on top of it".

"Q. Was there any response to that?

"A. Not to my knowledge.

"Q. Did you 'ride the engine through'?

"A. Yes, sir.

"Q. Going back to Little Mountain, was there reduced speed at Little Mountain?

"A. Yes, sir, at the west end of Little Mountain.
"Q. That is also a road requirement, is it?
"A. Yes, sir.
"Q. Do you know the speed at which you rounded the curve at Little Mountain?
"A. No, sir.
"Q. Could you estimate it?
"A. Nothing, only as to the rule, and as to Mr. McDonald's qualifications as judging.
"Q. What does the rule require?
"A. Fifty miles an hour, I think.
"Q. What?
"A. Fifty miles an hour on the curve, I think.
"Q. Do you know what the rule would require on the straight of way?
"A. Sixty-five, I believe.
"Q. Now, after rounding the curve going on the straight track into Bagley, was your speed increased?
"A. He set up the air at the west end of Little Mountain and 'kicked it off' just a short set up and release.
"Q. When you say 'kicked off', you mean?
"A. He released the air.
"Q. Did you observe him do that?
"A. Yes, sir.
"Q. What would be the reaction of 'kicking the air off'?
"A. Well, it would release, and then automatically pick up speed again.
"Q. He would resume speed, the running speed?
"A. Yes, sir.
"Q. Now, proceeding there right on to the point
53 of impact, was that air applied again?
"A. Yes, sir.
"Q. And, who applied it?
"A. Mr. McDonald.
"Q. Can you state approximately where that took place?
"A. At the signal, block signal in between Little Mountain and Bagley.
"Q. Now, you have stated there are three signals there?
"A. Yes, sir.
"Q. Can you state approximately where that would be in relation to these signals?

"A. I would say it was almost the middle signal.

"Q. That would be for the purpose of discussing, signal 7649.

"A. Yes, sir; to my knowledge.

"Q. Was the air-brake released after that?

"A. It presumably was, otherwise we would have stopped.

"Q. You state you 'presume that is the case'?

"A. Yes, sir.

"Q. Did you observe whether they were or not, that the air released again?

"A. Not at that time, no, sir, I didn't.

"Q. Was there any other attempt to apply the brakes?

"A. Not to my knowledge.

"Q. Calling your attention to the last block before Bagley, which is No. 7639, and at the point where you called the 'red signal' was there any effort made by Mr. McDonald to stop the train at that point?

"A. Not to my knowledge there wasn't.

"Q. So that your testimony is to the effect that the air brakes were applied just once at the block there, 7649?

"A. Yes, sir, that is the last to my knowledge.

"Q. Mr. Hardman, can you estimate the speed at which you were traveling at the point of impact?

"A. No, sir.

"Q. Was there anything about Mr. McDonald's demeanor, posture, or anything else, to alarm you?

"A. No, sir.

"Q. Did you see a red fusee?

54 "A. No, sir.

"Q. Mr. Hardman, did you at any time touch the air brakes on that engine?

"A. Not to my knowledge.

"Q. What do you mean—"not to my knowledge"?

"A. After the wreck, I went over and tried to find whether Mr. McDonald was still in there, in the engine or not, and it is possible that I could have touched them, and not knowing it.

"Q. Did you apply the air brakes at all?

"A. No, sir.

"Q. Do you know anything about Mr. McDonald's general reputation as an engineer?

"A. No, sir, not particularly.

"Q. Were you afraid of him?

"A. No, sir.

"Q. You knew he had been on the railroad a number of years?

"A. Yes, sir.

"Q. And had confidence in his ability to run that engine?

"A. Yes, sir.

"Q. For the purpose of information for the jurors here, what lights are there in the engine cab?

"A. There are lights to show your water. It is reflection light. It is covered to show you your water and steam *guages*, and such as that.

"Q. Are they indirect lighting?

"A. Well, yes, sir.

"Q. Looking across the cab at that time of the morning would you have been able to see Mr. McDonald by looking at him?

"A. Well, you see a man across there, but to identify him as to who he is, it would be almost impossible unless you know who you were looking at.

"Q. Would you be able to see an arm signal back and forth, that time of the morning?

"A. Not in the fog, no, sir.

"Q. Now, you have stated you had a conversation with him regarding, as I recall, is it the water pressure?

"A. No, sir.

"Q. What was the conversation?

55 "A. The 'oil' was what I stated. The heating of the oil.

"Q. Did you have a conversation with him from that time on?

"A. Yes, sir.

"Q. Can you state where they took place?

"A. Out near the Bridge was one place.

"Q. What was said there, please?

"A. I sanded it out and looked at his gauge, and his water, because our gauges sometimes vary, and immediately after that proceeding was all done, he told me where he

would like his water carried, and I asked him 'where it was at that time on his gauge'? and he told me, 'Right there' and pointed.

"Q. Was that the last time you talked to him?

"A. Outside of about the block signal.

Mr. Peterson: I think that is all of the questions I have. Does the Court have any?

The Court: I would like to ask Mr. Hardman some.

"The Court:

"Q. Mr. Hardman, did you remain on the engine?

"A. Yes, sir.

"Q. Until after the time of impact?

"A. Yes, sir.

"Q. Were you injured?

"A. Sir?

"Q. Were you injured?

"A. Yes, sir, minor, my shoulder and foot and my mouth here (indicating left side) and minor eye burns.

"Q. Whereabouts on the engine were you at the time of impact?

"A. Over on my side.

"Q. Which side is that?

"A. Left hand side.

"Q. The left hand side, and did you observe Mr. McDonald immediately before the impact?

"A. No, sir, the last time I noticed him was before the block signal when I called.

The Court: Do the jurors wish to ask the witness any questions?

Juror Purrington:

56 "Q. How far away were you from Mr. McDonald in the cab of the engine?

"A. I would say it was about six feet.

"Q. Six feet. At no time was you any time further away than that from him?

"A. No, sir, with the exception of when I went back to cut off the oil.

"Q. Didn't you, after you told him that you were passing

this signal, didn't you wonder why he didn't stop or try to stop?

"A. I expected to stop, sir, and hadn't went very far until I seen the rear end of the engine, or I mean First 21.

"Q. And you told him that, too?

"A. I called him that, too.

"Q. Still he never responded?

"A. Not to my knowledge.

"Q. And how long a time was that before the impact?

"A. That would determine what speed we were going and like that, but it was only just a matter of seconds.

Mr. Peterson:

"Q. Mr. Hardman, calling attention now back again to the point where you said it was your opinion the air brakes were applied, that was at block 7649. I believe you previously testified the brakes were applied at that point?

"A. There was an application of air at that point, yes, sir.

"Q. Now, that slowed the train, did it not?

"A. Yes, sir.

"Q. Would you know how much it slowed it?

"A. No, sir, I wouldn't.

"Q. Do you know whether or not the air was returned to normal after that time?

"A. Nothing, only as experience would tell me.

"Q. What would 'experience' tell you?

"A. That they had been kicked off and released, otherwise the train would have stopped.

"Q. Do you know whether or not you resumed normal running speed after that point?

"A. No, sir, I wouldn't know.

"Q. What would be your impression of that?

57 "A. I don't think that we was up to the 65 miles an hour.

"Q. Sixty-five miles would be your normal running speed?

"A. At that point.

"Q. It was your impression you hadn't gone back up to that speed after the application?

"A. Yes, sir.

"Q. Would you care to observe what you thought the possible speed would have been at the time of impact?

"A. I wouldn't care to guess. I am not in a position or qualified to judge that speed.

"Q. At the point of the air application did you discuss the fact the brakes were not applied, with Mr. McDonald?

"A. This signal before hand?

"Q. Yes, at the signal?

"A. No, sir.

"Q. Do you know whether or not that signal was 'red' or 'clear' at that point?

"A. No, sir.

"Q. You previously testified you did not see it?

"A. That is right.

"Q. Now, in order that the testimony may be complete, after the impact what did you do, Mr. Hardman?

"A. I got up and felt across the deck for Mr. McDonald, and went over to his side and felt until I thought I found the sanders. That is why I stated I could have touched the brakes. It was foggy and you couldn't see anything with the steam, and also dark, and you couldn't see anything at all. All you could do was feel, and I presumed that I touched the sanders. I reached across over the window feeling for Mr. McDonald and back to his seat, but I never did feel him.

"Q. Then what did you do?

"A. I got out.

"Q. That is, you left the engine?

"A. Yes, sir.

"Q. You were in a shocked condition, weren't you?

"A. I thought I was *alright* until after I got on the ground and I sort of relaxed for a while.

"Q. Mr. Hardman, as far as you knew that train,
58 the air brakes were working *alright*, weren't they?

"A. Yes, sir.

"Q. Do you recall that any adjustment was made on the throttle?

"A. Yes, sir.

"Q. Where was that?

"A. At the signal before Little Mountain or Bagley.

"Q. What was the adjustment?

"A. He dropped it down.

"Q. What would be the effect of dropping the throttle?

"A. Well, it wouldn't have the power and carry the momentum. It drops it down just the same as you are relaxing your gas on your car.

"Q. And, you say that took place where?

"A. Approximately that signal between Little Mountain and Bagley, somewhere in that location.

"Q. Would it be possible to state whether it would
59 be closer by description to Little Mountain than to Bagley?

"A. No, sir, I couldn't.

"Q. But you have a distinct impression that the throttle was dropped?

"A. Oh, yes, sir.

"Q. Was that the only change in the throttle you knew of?

"A. That is the only change I knew of."

CLARENCE A. RUSSELL, a witness for plaintiffs, testified:

I live in Ogden and am a brakeman and conductor employed by the Southern Pacific Company since June, 1925. I was head brakeman on Second 21 at the time of the accident.

After the train departed from Ogden, I was riding in the rear car with Conductor J. W. Welch and Flagman Dale Altman, and Mr. Cook, who was an express messenger. The conductor was sitting approximately in the center of the car on the south side, the flagman in the rear on the south side, Mr. Cook, the head seat on the north side, and I, the rear seat on the north side, as we left Ogden and approached the scene of the accident.

Q. Now, just before the accident did you observe any application of air?

A. Yes, sir.

Q. What were you doing at that time, please?

A. I was sitting in the rear seat.

Q. And what were you doing there, please?

A. Just riding.

Q. And will you describe this application of air, please?

A. The air was applied with a heavy service application.

Q. And what, if anything, did you do please?

A. When I made up my mind that they were going to stop I started to put my heavy clothes on preparatory to going outside. I didn't get my coat on; stood up and the shock knocked me to the floor.

Q. And then did you experience any further shocks?

A. Yes, sir, two additional.

Q. And what effect did they have on you, please?

A. They had no more effect on me as I was already lying down on the floor.

Q. Now, could you give us an estimate of the length of time between the application of the air on the brake and the first shock which you have described?

A. Somewhere within a minute.

The Court: What is the answer?

A. Within a minute.

Q. (By Mr. Roberts) And can you be more definite than that, Mr. Russell?

A. Yes, sir; I made a test with the superintendent and his stop watch; to the best of my recollection 12 seconds elapsed.

Q. 12 seconds; that is between the first feeling of the air—the application of the air—and the first shock?

A. Yes, sir.

Q. And describe please for us how it was you determined this 12 seconds. Tell us what you did in connection with that.

A. The superintendent asked if I would demonstrate to the best of my ability for the benefit of the record how much time had elapsed. I offered, and he arrived at this 12 seconds by the stop watch.

Q. What did you do, please, during that time?

A. Did the best I could to remember approximately how much time elapsed.

Q. And you did the various things which you did—standing up, picking up your coat?

A. Yes, sir.

Q. And that was all within the 12 seconds?

A. Yes, sir.

Q. Now, you have had experience riding as a brakeman or a conductor on passenger trains?

A. Yes, sir.

Q. And how long have you ridden on them in that capacity?

A. Sir?

Q. How long have you ridden on them as a brakeman or a conductor riding passenger trains?

A. Different periods of time since 1929 as a passenger brakeman.

Q. And during that time have you had occasion to observe heavy service application of brakes?

A. Yes, sir.

61 Q. And trains being brought to a stop by such application?

A. Yes, sir.

Q. And do you now have an opinion as to what type of application this was?

A. Heavy service application.

Q. A heavy service application?

A. Yes, sir.

Q. Now, when you got up—I assume you finally got up from the floor of the train?

A. Yes, sir.

Q. Of the car—what did you do then, please?

A. Express Messenger Mr. Cook handed me my lantern which was also on the floor at the head end of the car. We compared time with the conductor and the flagman. It was 5:14 A. M.

Q. And then what did you do, please?

A. We put on our heavy clothes, went to the rear platform and found a fusee burning approximately three cars to the rear of our train.

Q. And on which side of the track was that fusee, please?

A. The north side.

Q. And it was about how far you say?

A. Approximately three carlengths.

Q. And then what, if anything, did you do, please?

A. I went towards the head end of the train on the north side, got to where the cars were crisscrossed on the rail,

couldn't get by; went to the south side of the train, and there with Conductor Welch continued on up to where the collision had occurred.

Cross Examination.

There were 20 cars in our train and after the collision some of them were crisscrossed over the track; some of them came out of the train and were thrown off the track and in each case where that occurred there was a break in the train. As the cars left the train and crisscrossed, that shortened the train up.

Q. And the buckling out of the train of a car from time to time could well account for those lurches you described, couldn't it?

A. Possibly.

Q. Did you account for it in that way?

A. I don't know.

62 Q. But there were three separate lurches?

A. Distinct shocks; yes, sir.

Q. And they could have occurred by the buckling out of the train of certain cars?

A. Yes, sir.

Q. Do you have an opinion as to what speed you were moving at the time of the collision?

A. In excess of forty miles per hour.

Q. In excess of forty?

A. Yes, sir.

Q. That is, the time of collision?

A. Yes, sir.

Q. Now, if we use forty for illustrative purposes, your speed was reduced from 40 to nothing from the point of impact until you came to rest, wasn't it?

A. Yes, sir.

Q. Do you know about train lines?

A. Some.

Q. Brakes?

A. Yes, sir.

Q. You heard Mr. Ware testify this morning—Mr. Ware?

A. Yes, sir.

Q. There is an angle cock on the front of the engine, isn't

there?

A. Yes, sir.

Q. So if it should happen to hook up with another engine you could connect up the air between them?

A. Yes, sir.

Q. And if you break that anglecock you set the air in the whole train, don't you?

A. Immediately, yes, sir.

Q. What?

A. Immediately, yes, sir.

Q. So just the instant you break the anglecock off the front of that engine, the air went back to the rear car you were in faster than your train was moving, didn't it?

A. I don't know.

63 Q. Don't you know as an engineer—as a railroad man—that it does?

A. I don't know.

Q. You have no opinion?

A. No, sir.

Q. What is your judgment as to whether the air moves back from that engine to the 20th car at a speed faster than 40 miles an hour?

A. It is possible, yes, sir.

Q. Don't you think it does?

A. I think so.

Q. So just the minute that anglecock cracked, that train in front—or the air went on the end of your car, didn't it?

A. I don't know.

A. Do you think it did or didn't?

A. I don't know.

Q. What would you expect when you break the train-line, whether the air would go back into your car or not?

A. If the train line is broken the brakes apply immediately.

Mr. Ray: Isn't any question about it. One other question:

Q. The car you were in was the last car, wasn't it?

A. Yes, sir.

Q. And it stayed on the track?

A. Yes, sir.

Q. So that it was subject to emergency application of the brakes, wasn't it?

A. Yes, sir.

Q. And it did go into emergency, didn't it?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. Did you hear engineer Ware say that it has to go into emergency once the air line is broken?

A. If it is broken, yes, sir.

Q. That is true, isn't it?

A. Yes, sir.

Q. There is no doubt your train was broken, is there? You have testified you saw cars crisscrossed over the tracks, haven't you?

64

A. Yes, sir.

Q. So you do know the emergency went back into your car, don't you?

A. Yes, sir.

Q. Now, you also know, do you not Mr. Russell, that your car moved five or six hundred feet after the first impact?

A. Yes, sir.

Q. All right; let's take a piece of chalk and take a look at the figures.

* * * * * *

Q. If you are going 40 miles an hour—please assume with me for a moment if you will that you are moving at the rate of 66 feet a second, will you?

A. Yes, sir.

Mr. Ray: If I am in error about that you and I can correct it at noon.

Q. 66 feet a second; say this rear car you were sitting in had not had the brakes set and had not come to a stop, it would have kept going at 66 feet a second, but in 500 feet it dropped from 40 miles an hour to nothing, didn't it?

A. Yes, sir.

Q. So may we have an average of 20 miles an hour from the time you felt that brake until you stopped, 20 miles an hour; that would be 33 feet a second—

Mr. Black: Just a minute. Your Honor, this question now assumes a position contrary to the testimony. The witness didn't testify when he first felt that brake application he was only traveling 40 miles an hour. He testified—

Mr. Ray: I will eliminate that from it Mr. Black.

Q. Mr. Russell, you went from 40 to nothing, didn't you?

Mr. Black: I object to the question unless he says when.

Mr. Ray: We will get all that.

Q. You went from 40 to nothing, didn't you?

A. Yes, sir.

Q. So the average from 40 to nothing may be fairly said to be 20 miles an hour.

Mr. Roberts: That doesn't follow. We object to that.

Mr. Ray: Just let me finish a moment here. It does follow for the purpose of this question.

Q. And if 40 miles an hour represents 66 feet a second, 20 miles an hour would represent 33 feet, wouldn't it?

A. Yes, sir.

65 Q. And if you are going 33 feet a second you go 330 feet in 10 seconds, won't you?

A. Yes, sir.

Q. That is correct if these figures are right, isn't it?

A. Yes, sir.

Q. Isn't that right, Mr. Russell?

A. Correct.

Q. So that if after the train—the locomotive of your train struck the rear end of first 21 your car moved 500 feet, it would take more than 10 seconds for you to move that distance, unless you were going an average of more than twenty miles an hour, wouldn't it?

A. Yes, sir.

Q. Now, you have no doubt that the emergency set in your car, do you?

A. I didn't feel the emergency application.

Q. As you sit there right now you have no doubt it did, do you?

A. There is no doubt.

Q. You have no doubt that the emergency would be set in your car if the anglecock was knocked off the front of your locomotive by the collision, have you?

A. As soon as the train line was broken.

* * * * *

Q. Mr. Russell, there is space between the cars in a train, isn't there, some space?

A. Yes, sir.

Q. As the train is moving over comparatively level track as this was, it is stretched out, isn't it?

A. Yes, sir.

Q. And is there some slack in a train like that?

A. Yes, sir.

Q. And does the total amount of slack depend largely on the length of the train?

A. Yes, sir.

Q. So as you multiply the number of cars in the train, to that extent you increase the amount of slack?

A. Yes, sir.

Q. And would it be your judgment that when this train stopped in the manner it did, the slack had run in from the rear in towards the front?

A. I don't think so.

66 Q. What would become of the slack?

A. The air being applied on 20 cars would have in my opinion a tendency to keep the slack adjusted.

If you didn't keep the engine working steam your slack would run in to some extent; but if you are up against another train with your engine, the slack would have to run in and if the air is not applied it will run in. The application of air does not stop a train instantly. The car I was in stayed on the track and kept moving. I don't think the running in of the slack was responsible for the buckling of the cars and the fender out of the train. My heavy coat which I speak of was over the back of the seat just ahead of me and after I felt the wheels dragging I started to pick up my coat. I didn't have time to really pick it up and put it on and the next thing I knew I was in the aisle in the opposite end of the car.

I appeared at the inquest held in Ogden on the 16th day of January, 1944 and gave testimony. There were 9 cars derailed out of the train, with 11 cars standing upright.

Q. I want to read a part of the testimony you there gave; see if I read it correctly. Were you asked this question: "Mr. Russell, you have a good many years as a brakeman and conductor, and you know the application of brakes, do you not?" And you answered: "Approximately".

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. "And from your experience of having it applied at various times and conditions"? Your answer was: "Yes, sir".

A. Yes, sir.

Q. Then this question: "This heavy application you referred to, was that in your opinion,—and this leads to the question one of the jurors asked,—was that, in your opinion, the application of the brakes by some one, or could it have happened by the impact?" Do you remember that question?

A. Yes, sir.

Q. And your answer: "I cannot say". Do you remember giving that answer?

A. Yes, sir.

Q. And then the next question: "You do not know"? And your answer: "No, sir". You gave those answers at the inquest?

A. As I remember, yes sir.

67 It is my position now that I am unable to say whether or not the application of brakes which I felt resulted from someone applying them or from the impact itself.

Redirect Examination.

Q. And of course—in this connection—going on further with the questions that weren't asked you, I will ask you if you remember this question and answer Mr. Russell at that same time: "Was the motion of the train, the three other movements you have described, were they the type of move-

ments that the application of the brakes would bring on?" And you answered: "No sir." Do you recall that question and answer?

A. Yes, sir.

Q. "Or occasion"? And you said: "No sir". Then going on, question and then the answer: "They were caused by something different than the 'heavy application' you referred to?" And you answered: "Yes sir."

A. Yes, sir.

Q. And then this question and answer too: "At least they were a different movement than the air brake application?" And your answer was: "Entirely, yes sir."

A. Yes, sir.

Q. Now, at the time of this heavy application how fast was your train going?

A. Approximately maximum speed.

Q. Maximum speed, and that would be what, please, in miles per hour?

A. 60 miles per hour in that territory.

Q. And then you say there was this distance—or this amount of time between the first application and then the first shock.

A. Yes, sir.

Q. Now, at the first shock how fast was your train going in your best judgment?

A. Between 40 and 50 miles per hour.

Q. Between 40 and 50 miles an hour?

A. Yes, sir.

Q. Now, when you first felt this service application, what did you do, please?

68 Mr. Ray: I object to that question as assuming something not in the record. The witness has just now stated under oath that he didn't know whether that application came from the impact or from some one using the brake.

Mr. Roberts: That is right but he nevertheless has never left the position that it was a heavy application. If an impact will make that, all right.

Mr. Ray: That is all I am getting at. I know there was

a heavy application because he told us just before lunch.

Mr. Roberts: He said heavy service application. That is what this goes to.

Mr. Ray: He just said there was.

Mr. Black: It is only a descriptive term anyhow—

Mr. Ray: I won't bother about it if that is all you intend.

The Court: Now I do not get what—when did you begin to put your coat on?

A. After I had drawn the conclusion this train was going to stop.

The Court: You didn't wait until it stopped?

A. No, sir.

Recross Examination.

I don't know whether the cars that were pinched out of the train went out all at once or at intervals. If they went out one or two at a time over a very brief period, that would check the movement of the train, would probably cause it to lurch.

Direct Examination—(Recalled).

Q. Mr. Russell, directing your attention to testimony given yesterday, I will ask you now if you recall testifying concerning the shocks that you experienced subsequent to the application of the brakes; you recall that testimony?

A. Yes, sir.

Q. Having in mind the three shocks or four, whatever it was, that you experienced and felt, will you tell the jury which of those shocks was the most severe?

A. It's my opinion that the first shock was more severe than the other two.

Q. And why do you say that?

A. On account of being thrown the entire length of the coach in which we were riding.

Q. Had you ever experienced such a shock as that before in your whole railroading career as a result of brake action?

A. Not as severe as that.

69 I was in the vicinity of this wreck from the time it occurred up until afternoon that day; it was after 1:00 P. M. when I finally left. During the period of time that I was there, I didn't notice any people in or out of the cab of the engine of train Second 21. I didn't see any people in the engine.

DALE ALTMAN, a witness for plaintiffs, testified:

I live in Ogden, Utah and have been employed by the defendant as a brakeman and conductor since September, 1925. During the entire time I have worked out of Ogden. I have been in passenger service since June of 1926. I was promoted to conductor in 1942 and have served as conductor in passenger service. I was rear end brakeman on Second 21, west-bound from Ogden on the morning of December 31, 1944. In case the train stopped under circumstances where it could be overtaken by another train, it was my duty to go back and protect the rear end of the train by the use of fusees, torpedoes, red and white lantern. A rear end brakeman is required to protect the rear end of his train even in territory protected by block signals. Regardless of the territory you are in when the train makes an unscheduled stop, you are required to protect it. I tested the air brakes as the train left Ogden and after it attained the speed of 8 to 10 miles per hour the engineer tried the brakes. At the time the brakes were tested I observed that they worked. I came back inside and reread the orders and set down to await the curve for Little Mountain.

I noticed nothing unusual in the operation of the train or the train movement as it proceeded westward until it reached a point in the neighborhood of block signal No. 7649. At Little Mountain the speed of the train was between 60 and 65 miles per hour and I noticed no reduction of speed at any time. The reduction of speed at Little Mountain is usually slight and we are rarely conscious of it.

I was riding in the rear seat on the south side opposite Mr. Russell. He was on the north side, right across from me. Brakemen and conductors are not required to pay as

much attention to block signals, except when we go back to protect the rear end.

70 Q. Will you just state in your own language the experiences that you had there starting with about the time you passed this block signal 7649 up until the train and all the cars had come to rest.

A. Well, I can't state exactly where the air was applied, but that morning I had had no breakfast and after leaving Little Mountain I opened a Thermos bottle of coffee and as it was very hot I was shifting the aluminum cup from hand to hand; it was still too hot to drink; when the brakes applied I looked at Mr. Russell and he looked over at me and sat there a few moments, and had the brakes released Mr. Russell would have gone out and looked the train over and I would have gone on with my coffee. If the brakes did not release we would go to work. I satisfied myself we were coming to a stop and I put the cup of coffee on the seat in front of me and stood up and reached for my coat, and the shock came.

Q. Describe that shock, please.

A. Well, it was just a—it wasn't a complete stop but it was a sudden jar or sudden complete slowing down and then a lunge ahead, surge forward.

Q. What effect did it have upon you?

A. I believe I hit Mr. Russell and bounced into the seat; I didn't go down the aisle at the first shock.

Q. Were you standing on your feet at the time this first shock came?

A. Yes, sir.

Q. And about how long was that after you had felt this application of braking power?

A. Well, my original opinion was 30 to 45 seconds perhaps the brakes set. However, I was present at the time the 12-second test was made; I was of the opinion that was much closer than my original guess.

Q. Then it was somewhere between 12 seconds and your original guess—along in there?

A. Yes, sir.

Q. Do you know of your own knowledge that there was a lapse of time between the time you felt this first application

of braking power and the time when this first sudden lurch occurred?

A. Yes, sir, there was a definite lapse of time.

Q. Were you knocked down at all as a result of this?

A. Yes sir. I pushed myself to my feet from the first shock out of the seat and was knocked down on the second one to the floor.

Q. Knocked down the second time?

71 A. Yes, sir.

Q. Was the train moving all the time after this first shock when you were knocked down?

A. Yes, I had that impression.

Q. It was moving all the time? Mr. Altman, do you have any opinion as to the speed the train was traveling at the time you felt the air applied the first time?

A. Oh between 60 and 65 miles an hour.

Q. Was that the usual cruising speed in that territory?

A. About normal.

Q. Do you know whether or not this application of braking power that you experienced arrested and slowed the movement of the train?

A. Yes, it did decrease the speed rather sharply.

Q. Do you have any opinion as to the approximate speed of the train at the time you felt the first shock?

A. My guess from 40 to 50 miles an hour.

Q. The speed had been definitely reduced?

A. Yes.

Q. Can you describe in more detail the experiences and the sensations you experienced as a result of these shocks that occurred?

A. Well, the first one put me into the seat and I pushed myself back to my feet; and the second one knocked me to the floor, and for the third one I held onto the seat to keep from going on the floor, keep from being shoved down the aisle.

Q. There were definitely the three?

A. Yes, definitely, and I don't recall whether there was another lunge as we came to a stop or not; I have no idea whether the third one was the arresting of our forward motion or whether we continued; I have no idea as to that.

Q. At any rate the train was moving during this period of time?

A. Yes, sir.

Q. After the train finally came to rest, what did you do, Mr. Altman?

A. I got up, lit my red lantern, found my white lantern, put on my heavy clothes and went back to flag.

72 I went back toward the east approximately to block signal 7649 and observed that the arm of the signal was in stop position. As I was approaching the signal from the west, I could not see the light but could see the arm when I was two telephone pole lengths away from it. When I passed block signal 7639 I noticed that it was in a stop position displaying red. After the train had come to a rest, I saw a fusee burning on the north side of the north rail, about three or four car lengths east of the rear car of Second 21. There was around four minutes of the fusee left, that is about four-tenths of the fusee left when I saw it, it was slightly over half burned. The fusees are made to burn ten minutes. I made no observation with respect to burned fusees in the neighborhood of block signal 7639.

Q. Mr. Altman, was there any similarity or resemblance in the sensations you experienced as between and immediately following the application of air, and the ones you experienced later on when you experienced these shocks?

A. No, there was no resemblance at all.

Q. I take it, Mr. Altman, during the years you have worked you have experienced the ordinary reactions of bringing a train to a stop by the application of air?

A. That is right.

Q. And do you have a definite recollection now of the experiences that you knew there immediately after the air was applied before the accident?

A. Will you repeat the question, please?

Q. Do you recall definitely now the sensations that you experienced there after this first service application of air was made?

A. Well, my sensation—my thought was—as I say I had the coffee in my hand, and I was chilled from standing around, and my thought was if the engineer did go and re-

lease the brakes, Mr. Russell would go out and inspect the train; if he came to a stop I would have to go, and my only thought was to ascertain whether he was going to release them. When I decided he was coming to a stop I set the coffee down; that is the only—I believe that is what you mean—

73 Q. Was that sensation comparable in any way to the ordinary sensation you know when a train is brought abruptly to a stop by the use of braking power?

A. Yes, it is like any heavy stop; the car would jerk as the brakes take hold of the wheels.

Q. Was it your opinion there at that time that it was a heavy service application?

A. I would say so.

Cross Examination.

I testified at the Interstate Commerce Commission hearing on January 6, 1945 and 10 days later I appeared and gave testimony at the inquest and I was sworn in both instances. My first impression was that there was a lapse of time between the application of the brakes and this shock or lurch, which I referred to of 30 to 35 seconds. I later witnessed an experiment and revised my idea of the time which elapsed to approximately 12 seconds.

74 Q. Now, at the time you testified on January 6th and again on January 16th, it never had occurred to you that there was any emergency application of the brakes in that car, had it?

A. No, I couldn't tell whether it was; as far as I know there was no emergency application.

Q. It had not occurred to you, had it?

A. No.

Q. But you know now when you think of it and you know your train was broken in two, you know there was, don't you?

A. Well, there would have to be to break the train line.

Q. You know there was now as you sit here and think about it in that light, don't you?

A. Well, I don't know for sure.

Q. Well, you found your air was working all right when you left Ogden?

A. Yes.

Q. And you know when the trainline breaks any place you just cannot help setting the emergency brakes, don't you?

A. That is right.

Q. So don't you have to conclude now, Mr. Altman, that there was emergency application on that car?

A. Well, that is the ultimate result, yes sir.

Q. So you agree with us on that?

A. Yes, sir.

Q. Now, would you agree with Mr. Russell that there is some slack in a train of 20 cars?

A. Oh, yes, sir.

Q. And that slack is kept from running in as you are moving along and making an ordinary stop at a station by continued working of steam, isn't it?

A. That is correct.

Q. Now if you didn't work steam, just put on your brakes, your train would pile up, wouldn't it?

A. Well, you would have a slack action.

Q. And depending on the amount of slack that you had to run in you would have more or less slack action, wouldn't you?

This is correct.

75 Q. I suppose if you had a train of 50 or 60 cars there would be more slack action in it than a train of 20 cars?

A. That is right.

Q. But in either event it is necessary to keep it stretched as you are coming to a stop in order to prevent the running in of the slack, isn't it?

A. Yes, sir.

Q. Have you been taught—have you learned from experience that that is necessary?

A. Yes, sir.

Q. And so if the train stops by running into an object or by sudden emergency application, the train is not kept in a stretched condition, is it?

A. That would be so.

Q. And they have to run in one against the other?
A. Yes, sir.

I recall my testimony given at the inquest.

Q. Do you remember this question being asked to you: "Was it the type of application that might have been caused by the impact?" Do you remember that question?
A. I don't recall it now.
Q. Would you say that was or was not put to you?
A. Yes, I imagine it was.
Q. And your answer: "I wouldn't be able to say as to that, it is possible." Do you remember that?
A. Yes, sir.
Q. And then the question: "Have you formed any independent opinion on that point?" And your answer: "No, I wouldn't pass an opinion on it." Do you remember that?
A. That is right.
Q. And is that still correct?
A. Yes, sir.
Q. This application of the brakes that you felt may or may not have been caused by the impact?
A. That is right. I have no way of knowing.

Redirect Examination.

76 The rear end collision which I have described was the first and only experience of its kind that I have ever had.

Q. Now, Mr. Altman, did your train stop as a result of the use of braking power or because the train as a matter of fact ran into the rear end of first 21?
A. I couldn't say; I imagine it stopped through the result of the collision.
Q. You think that had something to do with your stopping?
A. I am sure that was the ultimate cause.
Q. Were you ever on a train in your life that stopped as quick as that train did?
A. No, sir, not at that speed.

Mr. Ray: You mean any other train.

Mr. Black: Any other train. Thank you Mr. Ray.

Q. Mr. Ray called your attention to certain questions and answers which were given and made in the inquest. I will ask you to state whether or not the following questions and answers were not given and made. (page 84)

"Q. Your impressions are no different than theirs as to what took place there?

"A. No, my impression was when the brakes set up it was a heavy application. I ascertained in my mind it was not a reduction to slow the speed, to slow down, my idea after that moment was he was going to stop, it was that heavy. So I stood up to put on my coat when the first impact came.

"Q. How far did you get up?

"A. I was just reaching for my coat, stood on my feet, stood up in the aisle and reached for my coat when the shock came.

"Q. Was that heavy application enough to throw you, in standing up, off balance?

"A. No, sir; there was no jar with the application of the brakes as they ground into the wheels it jerks the coach until the brakes again equalize on the wheels.

"Q. Did you have that impression that was taking place?

"A. Yes, sir.

"Q. From your experience of railroading can you conceive of that application being anything but a 'heavy application'?

"A. No, sir; it was a heavy application."

Q. Were those questions asked and those answers made as part of the investigation?

A. Yes, sir.

Direct Examination (Recalled).

77 I recognize plaintiffs' Exhibits 9 to 18. These pictures taken at the scene of the collision between First and Second 21. I was there at the time of the collision and for many hours thereafter and the pictures are fair likenesses of various parts of the two trains involved. Exhibit 18 is a picture of Engineer McDonald and his engine, he being dead at the time the picture was taken. Exhibit 9 is a picture of the first section of 21, the head coach that was

damaged. This picture shows one coach inside of another taken from the north side looking east toward Ogden. That was the west car of First 21 that was wrecked and derailed. The only other cars on First 21 that was derailed was the Lake Cushman, which was the last on the rear car on First 21. That was the car that the engine of Second 21 crashed into.

Q. Now, Mr. Altman, I show you Exhibit 10 and will ask you to exhibit that to the jury and state what portions of either of the trains appear in the photograph.

A. This is the complete wreck shown from the engine of second 21 where it is into the rear car, and then this is First 21 going toward the west.

Q. Is the picture taken looking toward the west?

A. That is right, the picture shows the train toward the west.

Mr. Black: Do you all see the engine, second 21 engine?

The Witness: You can see the box up here on top of the engine, right here (indicating). That is on top of the boiler near the front end of it. You understand, you see the significance of that?

Q. I show you now, Mr. Altman, Exhibit 11. Will you exhibit it to the jury and tell the jury what portion of the wreck appears in the picture?

A. Well, this shows a better view of the engine and the rear two cars of first 21.

Q. That is the second 21 engine?

A. That is second 21's engine where it is into the first—or the rear car of first 21, showing a portion of the boiler.

Q. Do you know which car Jack Francis and his wife were riding in at the time they were killed?

A. In the Lake Cushman, the rear car on First 21.

78 Q. Can you see any portion of the Lake Cushman in the picture the jury is now examining?

A. Yes, it is the car the engine is into.

Q. I show you now, Mr. Altman, Exhibit 12. Will you examine it, exhibit it to the jury and tell the jury what portion of the equipment involved in the wreck appears in the picture?

A. This picture is the Engine 4361, the engine on second 21, from the north side looking east. The oil tank of the engine, the water tender, is over on the side upon the tank.

Q. And the drivers are off the rails?

A. Yes, that is right. You can see the rail behind there.

Q. By the way, Mr. Altman, was the engine completely off the rails?

A. Yes, sir.

Q. It was completely derailed?

A. Yes.

Mr. Ray: The rails were torn up?

The Witness: The rails were shoved back, kicked out. You can see them there, Mr. Ray.

Q. Will you point the matter that Mr. Ray suggests out to the jury?

A. You see the rails are laying behind the driver wheels. You can see portions of them between the wheels. The engine derailed, kinked the rails and kicked them out from under, tearing them up.

Exhibit 13 is a picture of the first three or four cars of First 21 taken from the south side looking west after the head end portion of the train had moved on. Those were the westward or the head cars of First 21 that were wrecked. One car is inside the other. This is a view from the opposite side of the train. It would be my guess that these cars would be about sixth or eighth from the engine of First 21. Only the head portion of the one car that is inside the other was derailed. I believe the one car was inside the other 45 feet; they were what we might call telescoped, the one car was pushed right up in through the other.

Exhibit 14 is a picture of the diner with the tourist sleeping car inside of it. The sleeping car is inside of the diner, right to the pantry. These cars were also in First 21. There were no telescoped cars in Second 21. Both sets of telescoped cars were in First 21.

79 Exhibit 15 is a picture of Second 21 near the head end. The top of the engine and the cab of the engine

appear. The car is lying crosswise against it. The other cars are mail cars and an express on Second 21.

Exhibit 17 is a picture taken from underneath the rear car of First 21 showing the engine of Second 21 inside of the car, inside of the Lake Cushman, the rear car, near the poney trucks and the cylinders. This is the guide we were speaking about yesterday that was not on the freight train. This is the engine and this is the car (indicating). This is the engine and this is the car. You can see the engine wheels and the cylinders and the pistons and a battery behind that. This was taken also from the south side of the train.

Exhibit 16 is a picture of engine 4361, Second 21's engine. It shows the engineer's hand out of the window. You can see the arm rest in the photograph.

Q. And where is the arm rest with relation to the arm that appears there?

A. Right underneath it. It runs right along underneath it. You see the shoulders here, the right shoulder. You see the number of the engine under the window running this way (indicating)—this is rather at an angle—this is the windshield and his arm is out over the arm rest. It is just a padded board.

Q. I show you now, Mr. Altman, Exhibit 18, and will you examine the exhibit and show it to the jury and explain what you see in the picture, what appears?

A. This is a picture taken on the north side of the engineer, the engineer's side, the right side of Mr. McDonald. This is the arm rest and this is the throttle quadrant and the throttle hangs down here. You can't see the handle of it. That is the position he was sitting in with his arm over this throttle quadrant, which is notched to hold it in different positions either opened or closed.

Q. As you come down to this end of the jury I wish you would explain the various mechanical—

A. This is the arm rest. This lever here would be the reverse lever cutoff. This is a curved bar that the throttle here latches into called the quadrant, and his left arm was hooked over that. This rubber ball is a bumper so the throttle can come back only to that point, so it can't come clear

off the quadrant. This would be the arm rest. This would be the reverse lever, and this is the throttle that hangs down here out of sight, and this quadrant is shaped like that with teeth under it. The throttle latches into it and the rubber ball at the end is to prevent the throttle from coming off, completely off the quadrant.

80 After the trains came to rest following the collision, nine of the twenty cars in Second 21 were on the rails. The rear nine cars of Second 21 were on the rails. The first nine cars immediately behind the engine were turned over or pushed off the right of way. The tenth car from the locomotive was completely derailed and standing upright. The forward or west trucks of the 11th car from the engine, an express reefer, were derailed to the north, but the rear trucks were on the rails.

Q. Can you describe now the position that those first nine cars behind the engine came to rest in, approximately, the best you can?

A. Well, one was completely out into the Lake to the north of the track, and one car turned over against the cab of the engine, across both main tracks, and I believe the rest were more or less derailed to the north or right hand side.

Q. How many of them were on their side or upside down?

A. Well, as I remember all ten. The head ten cars were either turned over or upside down completely.

Q. And the 11th car was still standing upright?

A. That's right. The 10th and 11th cars were standing upright.

* * * * *

Q. Mr. Altman, directing your attention to the testimony of yesterday, you stated after you experienced the application of the breaking power you felt a distinct or several distinct shocks?

A. That is right.

Q. And these shocks occurred while you were standing in the aisle or about to stand up in the aisle. How did the first of those shocks compare in strength and force with the other shocks?

A. Well, the first shock was, I think, a good deal heavier than the other two. I would say quite a bit heavier.

Q. And why do you say that?

A. Well, Mr. Russell was knocked from the rear end of the train, of the coach, to the front end with the first shock. However, I was only knocked into a seat at an angle. But as I recall it was much harder than the other two. I don't think the other two were anywhere near as hard as the first one.

Recross Examination.

81 The cars closest to the engine on Second 21 were pitched out of the train the greatest distance. They were apparently subject to the most violent action of any of the cars in the train. All of these cars that were derailed were separated from each other, with the exception of the 10th and 11th cars. They were still coupled as I remember. The tender was jack-knifed from the engine to the north. The next car to the engine was turned over, tipped up against the cab and there was one car across the tracks and the rest were turned over towards the north.

JAMES W. WELCH, a witness for the plaintiffs, testified:

I reside in Ogden: I am employed by the Southern Pacific as a conductor; I have worked for the company since 1923, was conductor on Second 21, west-bound from Ogden December 31, 1944. My brakeman were Mr. Altman and Mr. Russell. At the time of the collision I was riding in the last car on the train. We made a running air test as we pulled out of Ogden.

Q. Now, was an application of the brakes made after passing 7649?

A. The first application of the brakes that I noticed after we left Ogden was in the vicinity of the wreck at Bagley.

Q. And will you describe your sensations at that time?

A. Leaving Ogden this was an uneventful trip; as far as I could see we were sailing along at what I thought was the maximum speed until we came into Bagley, and all of a sudden there was a heavy application of the air. I was sit-

ting near the middle of the car with my feet over on one seat and sitting in the other with a clipboard in my hand writing, doing my book work; there was a heavy application of the air and I grabbed my right-hand grip of the seat and held on, and after a short period of time there was three distinct and separate lunges forward. After that happened I got up and asked my *brakeman* to compare time, and I said: "We have hit something." They pulled their watches out and we compared time and it was 5:14.

Q. What was the effect of these three separate shocks, or lurches as you call them? What effect did they have on you?

A. Didn't have any effect on me because I was
82 *holding* on. It had that sensation of taking a dive.

Q. Now, do you have a recollection or judgment as to the length of time between the first—between that application of air and the first shock or lurch?

A. I wasn't concerned in that. At the time I didn't think of anything like that, and the recollection that I had of the time was very vague until in the Interstate Commerce Commission investigation the superintendent asked my brakeman to make a demonstration of what he did at the time of this action from the air brakes. I didn't know what he did because they were in the rear of the car in back of me, and at the time of this air action I was looking forward and I didn't see either of them. It was demonstrated—I think Mr. Altman or Mr. Russell got up very carefully demonstrated what he said he did; they held a stop watch on him and I think they said it was 12 seconds.

Q. And how did that compare with your judgment?

A. My recollection, like I said, was very vague; I wasn't thinking of that at the time of this application of the air because I wasn't expecting something like that.

When the cars came to rest, I went out of the rear end door and saw a fusee burning to the rear or some three or four car lengths to the rear. I walked back with one of my *brakeman* and examined the fusee and thought that it had been burning five, six or seven minutes and had left the balance between that time and ten minutes. I then walked back toward the head end and told the brakeman to watch out for a broken rail because I thought we were in the ditch.

Cross Examination.

Q. Mr. Welch, you have appeared at both the Interstate Commerce Commission hearing and the inquest, did you not?

A. Yes, sir.

Q. Would you now state—having thought about the matter and having heard the testimony given here today—Mr. Welch would you now state it must have been an emergency application of the brakes on your car?

A. Prior to that wreck I didn't know what an emergency application was like on a passenger train. Since that time I have had two or three occasions to witness an emergency stop and there was very little difference in the action from these emergency stops that have been made recently with me on a passenger train and that one there; they both had the same effect. I might add this: there is a difference between an emergency stop—the effects of an emergency stop—on a passenger train and on a freight train.

83 At the time of the application I was busy with my book work. My attention was focused upon what I was doing and my attention was first distracted by the application of the brakes. Since that time I have had experience with emergency stops on passenger trains.

Q. Now, from that experience are you now able to say that the applications of the brakes you felt on this occasion were substantially the same as those emergency applications you felt since then?

A. That is right.

Q. Your answer is yes?

A. Yes, sir.

Q. And you also know from your long experien e in train service that by reason of the breaking of your tra. it was inevitable that the emergency brake would set on your car?

A. Well, any time a trainline is broken on a train, on any part of the train from the engine to the rear end, will cause an emergency action.

Q. Now, so then I take it, Mr. Welch, that the application of the brakes which you felt on this occasion may very well have been caused by the impact?

A. As far as I know.

Q. When I say "impact" I mean the collision of the front of your train with the rear end of first 21.

A. I don't know where the collision took place; I don't know whether the collision took place at the time the air was set or the time the cars started jumping through the air; I don't know that.

Q. But you would assume, I take it, that the cars went through the air because of the collision?

A. Yes, sir.

Q. And are you willing now to agree with us that the collision set the emergency, if not at once, then the breaking of the train?

A. I can answer that this way: if our train struck the other one before the brakes set up, the result of that collision would have caused an emergency application.

Q. Now, it could have been caused from the breaking of the anglecock on the front of your engine, couldn't it?

84 A. Yes, sir—well, any place on the train.

Q. Any place it broke. And then as soon as the airline broke it would set the emergency in your car—practically?

A. Yes, sir.

Q. And the application of the *break* which you felt may very well have resulted from the break in that train line at the time of the collision?

A. As far as I know it would have caused that if the trainline had been broken.

Q. And there would be some lapse of time after the brakes were on in your car before your car came to a dead stop, wouldn't there?

A. Well, that depends on the momentum of the train at the time the air is applied.

Q. You have had occasion since this experience to be on a passenger train when the emergency brake is applied?

A. Yes, sir.

Q. And it doesn't stop your train at once, does it?

A. No, sir.

Q. Runs quite a distance?

A. Yes, sir.

Q. And the car you were in ran quite a distance after the collision, didn't it?

A. I didn't measure the distance our train traveled from the point of impact but I was told afterwards our train traveled in the neighborhood—if I am correct—it has been a long time—500 feet.

Q. And some of the cars were pinched out of the train entirely, were they?

A. Yes, sir. There was one car lying completely across the eastbound main line.

Q. And the tender was pinched—

The Court: For information—when you apply the emergency brake does that make the wheels slide?

A. It would, sir, on a light car but not on a heavy car.

The Court: They will still turn?

A. As long as they are moving. You can slide a car by putting the emergency brake on while that car is standing still, but it is very seldom the wheels will slide from an emergency application on a loaded car that is moving. The only condition that might cause that would be an oily rail or something which would—

85 Q. (By Mr. Ray) After these cars left your train did the rear cars, the ones behind, close up the gap?

A. I don't remember any shock; it didn't knock me out of my seat, and as I walked up the train I don't remember of seeing any drawbars driven in, so I think the reason there wasn't a severe slack action was because the brakes were set, causing the cars to have a *tendancy* to pull back, and the only thing that could force them over and above that would be the momentum of the train.

Q. And they had such momentum as any similar train has going at 40 miles an hour or more?

A. Oh, yes, sir, I imagine with this forward movement of the train that I recall, the entire train went that way.

Q. Went forward?

A. Yes, sir.

Redirect Examination.

Q. Mr. Welch, now, of course, before the time of this accident out there you had many times experienced a heavy service application of the brakes on a passenger train?

A. Well, I have noticed the regular stops we
86 would make on a passenger train. It's not usual that they make heavy applications on a passenger train. If a passenger train is coming to an ordinary stop, they graduate that air application to keep from making a rough stop and in ordinary stops on a passenger train, the air is handled accordingly.

Q. That is true, but you have had rough stops—I will put it this way: Have you experienced rough stops on passenger trains?

A. No, sir, I haven't had many. The only rough stops I have had have been on freight trains.

Q. And you have never had any rough stops on passenger trains?

A. No, sir.

Q. Even these emergencies that you have talked about since this accident?

A. The rough stops—or the emergency stops that I witnessed through my own action didn't cause a rough stop. What I mean by a rough stop, piling up the cars.

Q. And was this stop up here at the time of this accident, was that a rough stop?

A. No, sir, it was a heavy application of the air, very heavy.

Q. And whether or not it was an emergency or a heavy service application, you don't know?

A. Well, I don't like the word "service" because service application has to be originated by a human hand.

Q. That is right, and you don't know which one it was, do you?

A. No, I don't know whether it was or not—it was heavy, very heavy. It would have been caused by an application of the air from the engine.

Q. In other words, that type of stop which resulted here could have been well caused by the action of the engineer using the automatic brake?

A. Yes, they can do the same thing in the engine.

Q. And whether or not this was a heavy service application you do not know?

A. No, sir.

87 Q. Now I think in answer to a question of Mr. Ray—

A. I am answering that way, as I understand your question, that—well, I don't know how to answer it so I will let it go.

Q. Now, I think in answer to a question of Mr. Ray's you said that if the air was not set up until after the impact that the impact well could have caused release of the air in the brakes?

A. By breaking the train line some place on the train.

Q. Yes. Now, of course, if the air were set up first by the engineer, then the application or the heavy application of the brakes which you heard could have been caused by the engineer?

A. I don't understand your question.

Q. Well, this first application of air as I understand could have been placed on there by the engineer, he could have made that application from his position in the engine?

A. So far as I know. That's where it can originate, in the engine.

Q. And it could have this night or this early morning, it could have originated there?

A. I don't know where it originated.

Q. You can't tell one way or the other?

A. No, sir.

Q. Of course, if he put it on first, then it wouldn't have been caused by the impact?

A. No, if he put the air on and there wasn't a broken train line in addition to a service application—

Q. But—

A. —a service application can be made and the train line broken afterwards and still cause an emergency application.

Q. That is true. In other words, he could have put on the application and later a break and then the emergency, that could have happened, couldn't it?

A. Yes, sir.

Recross Examination.

Q. Did you hear the testimony of Russell and Altman?

A. Today?

Q. Yes.

88 A. Yes, sir.

Q. That there was only one application of air?

A. Yes, sir.

Q. And that the other influences upon the train were not applications of air—you heard them testify to that?

A. Well, I don't remember just the question you asked.

Q. Did you get it in your mind they testified they felt only one application of the air and that these lurches or shocks were entirely different? You heard that?

A. Yes, sir.

Q. Now, if there was only one application of air in view of the fact that this train line was broken all to pieces, that one single application must have been an emergency, must it not, Mr. Welch?

Mr. Black: That is argumentative, I think. It is not proper cross examination. Object to it.

Mr. Ray: You put him on the witness stand as an expert.

The Court: Well, he is expressing an opinion as an expert. I suppose he can be cross examined about it.

Q. (By Mr. Ray) Did you get that question, Mr. Welch, or would you like to have it reread?

A. Please.

(Question read as follows:) Now, if there was only one application of air in view of the fact that this train line was broken all to pieces, that one single application must have been an emergency, must it not, Mr. Welch?

A. Yes.

Redirect Examination.

Q. Of course, if the brakes had gone into an emergency application during one of those lurches, you wouldn't have felt it then, would you?

A. Wouldn't have felt what?

Q. The emergency application of the brakes?

A. It was a continued application. The brakes set up and they never did release. The brakes were set after the train started making those high dives.

89 Q. Well you first felt an application of the brakes?

A. Yes, sir.

Q. That was the first sensation that you had—

A. Yes, sir.

Q. —as I understand you. Then there were these shocks or lurches?

A. Shocks—they weren't shocks, they were lurches.

Q. Well, these lurches after you felt the application of air on the brakes?

A. Yes, sir.

Q. Now, with those lurches coming, the train line could be broken on one of those lurches and the application of air be continuous on the brakes?

A. I don't know when the train line was broke or where.

Q. But it could have come during or at the time of this first lurch, could it not, and there would have been no difference so far as the brakes were concerned or your being able to feel them?

A. No, sir, not that I know of.

Q. I say, it could have happened that way?

A. Well, I just don't know how to answer that, how you mean that. The brakes were set up and then went to emergency?

Q. Yes.

A. I think I answered that question once by stating that if a service application was made and the train line was broken afterwards, it would cause an emergency application.

Q. Yes. And the emergency application could have occurred after the service application?

A. If the train line was broken.

Q. If the train line was broken after the heavy service application?

A. That is right.

Recross Examination.

Q. But you felt only one application of the brakes?

A. Yes.

Q. And there being only one you are satisfied now that was an emergency application, isn't that correct?

A. I think so.

WILBUR P. COOK, a witness for the plaintiffs, testified:

I reside in Ogden, Utah, and on the 31st day of
90 December, 1944, I was employed by the Railway Express Agency as an express messenger. The ex-

press messenger carries the waybills on the cars he is protecting to destination. At that time I had been so employed for about two years, working between Ogden and Frisco. On the trip mentioned I was guarding 11 cars. The remainder were all mail. As we left Ogden I was riding in the coach on the rear end of Second 21. Conductor Welch and Brakemen Altman and Russell were in this car. I was seated in the second seat from the head end on the north side. As the train left Ogden I was making copies of waybills to give the conductor and was still working on this job at the time of the collision and continued writing until I felt the first application of air.

Q. I see. Just describe to the jury what you
94 experienced at that time.

A. We were riding along at what I would assume to be a normal rate of speed. And while I was writing, I felt this application of air and heard it and I stopped writing and glanced out the window expecting to see some sort of settlement, I suppose, lights of some kind, because I expected us to come to a stop. And as I watched out the window a red flare passed and soon after we passed it we made the first impact.

Q. What position were you in at the time of the first impact, as you call it?

A. I was sitting in the second seat with my feet in the first. And with that first shock I slid down in the seat and the second shock put me on the floor between the seats and the third one I believe we stopped.

Q. The train was moving all the time between the first and third shock, as you described it, is that true?

A. Well, it wasn't riding smooth. What I mean is, it didn't give a shock and then drift along smoothly. It was grinding on and the coach was bobbing around but there were three distinct shocks.

Q. And during that period of time you may state whether or not the coach was moving. Was it traveling?

A. Yes.

Q. Mr. Cook, about how long a time elapsed between the time when you felt the application of the air brakes and the time when the first shock was experienced?

A. Well, I have been asked that a number of times. I said first it was some time less than a minute or about a half a minute. That's still my best judgment.

Q. There was about a half minute's time elapsed between the time when the air was set up and the time of this first shock?

A. Yes.

Q. Up to the time that you felt this application of air you may state whether or not you noticed any variation in the speed of the train.

92 A. Well, naturally, we were slowing down all the time.

Q. No, prior to the time you felt the application of the brakes—

A. Oh, beg pardon.

Q. —had you noticed any variation or change in the speed of the train?

A. I hadn't noticed any.

Q. Was the speed of the train about normal up to that point?

A. Yes, I would assume it would be.

Q. What if anything did you notice with respect to the variation in the speed of the train after you felt this application of air brakes?

A. We slowed down.

Q. And about how fast would you say the train was going when you felt this first shock?

A. Well, I don't know that, but I would say we had slowed down probably ten miles an hour, a difference of ten miles an hour.

Q. You had slowed down somewhat at least?

A. Yes.

Q. Did you try to get on your feet after this first shock occurred?

A. No, I didn't.

Q. And as I understand your testimony, you were on the floor when the train finally came to rest—

A. Finally stopped.

Q. —and stopped?

A. Yes.

Q. Do you have any idea the length of time that elapsed during the period while the three shocks were taking place?

A. No, I haven't. If I had been asked sooner after the wreck maybe I would have. It has been too long.

Q. I see. But the car was moving up until the time of this third shock?

A. Yes.

Q. You are sure of that. What did you do after the train stopped?

A. I got up from the floor and picked up a lantern and handed it to the brakeman and I remember asking
93 what they thought had happened and I believe the conductor said, "We probably have hit the first section," and they went on out while I gathered up what waybills I could find. Then I put my hat and coat on and went on out to the head coach on the north side. I walked along the north side of the train towards the head end.

Cross Examination (by Mr. Ray).

I have never been in train service; my connection with railroading was riding on the train in the interest of the Railway Express Company. I have never used air brakes, I have never had any occasion to pay much attention to air brakes. I was taking care of my book work up until the time the air was applied. I felt an application of brakes that was sharp enough to startle me out of my attention to the books.

Q. And quite naturally as you sat there working and felt this sharp application of the brakes you looked out the window?

A. No, I wouldn't say suddenly as that.

Q. What would you say?

A. I would say it aroused my attention and I looked out the window.

Q. And you looked out the window?

A. Yes.

Q. Now, you have no way of definitely fixing intervals of time under such circumstances, have you?

A. No.

Q. It is pretty much a guess, isn't it?

A. That is right.

Q. But you are sure that you felt the shock and looked out the window?

A. No, I felt the air.

Q. The air, I mean, and looked out the window?

A. Yes.

Q. Had you ever experienced anything like this before while you have been riding the train?

A. No.

Q. Nor since?

A. No.

Q. That is the only experience of this kind that you ever had?

A. That is right.

Q. And you don't know whether the application of the brakes was emergency or what it was, do you?

94 A. I have never felt an emergency other than that.

Q. That is the only one of that kind you ever felt?

A. Yes.

Q. As far as you know it might have been emergency or it might not, that is true, isn't it?

A. Yes, from my experience it would be, yes.

I testified before the Interstate Commerce Commission and stated: "I started making copies of waybills and we traveled along at a normal speed and I was not aware of a fog outside and I continued to copy bills until I felt brakes apply and I glanced out the window and about that time saw a red flare pass my window."

95 Q. I guess you wouldn't find it possible to give us the number of seconds or fractions of a second or anything of the kind between the time you felt the application of air and saw this flare go by?

A. That was of course the majority of the time because immediately after the flare passed we met the first shock.

Q. What is "immediately"?

A. I can't give a definition.

Q. No, you can't tell us and you wouldn't be able to give it in seconds, would you?

A. No, I don't believe anybody would.

Q. You wouldn't care to give us any estimate of how long you have been sitting on that chair testifying, would you?

A. No, sir.

Q. And so it is just a guess as to how many seconds passed from the time you saw the flare until the collision occurred, is that right?

A. Well, we have words to express that like "immediately"; that is why I used it.

Q. But you can't translate "immediately" into seconds?

A. No, I can't.

Q. It would be asking too much to require you to?

A. Yes.

Q. And that is pretty much true about the whole occurrence, isn't it?

A. I just gave an estimate of the time the same as the rest did.

Q. And you didn't observe the experiment that they referred to, I guess?

A. No, I didn't.

Q. And their first estimate—you heard them say their first estimate was two and a half to four times as high as it was after they had made some experiment?

A. That was Mr. Altman's testimony, yes.

Q. But reducing it now, cutting out the effort to reduce the matter to seconds or fractions of a second, the fact is that very soon after you felt this brake you saw a light, a flare, go by, and very soon after that you felt the collision?

A. There was an appreciable space of time.

96 Q. Appreciable, that is, all three didn't happen at the same instant?

A. Oh, no, not by a long ways.

Q. So there was an application of the brakes, you saw a light, and then you felt a shock or lurch, that is the sequence, is it?

A. That is the sequence, yes.

Redirect Examination (by Mr. Black).

Q. Did I understand your testimony correctly, Mr. Cook, that more time elapsed between the time when you felt the application of air and the time you saw the flare than between the time you saw the flare and the time you felt the first shock?

A. Yes, there was a great deal more time on the first.

The following operating rules were read into evidence:

Rule 293: "A signal improperly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as the most restrictive indication that can be given by that signal.

The absence of a light, or a white light displayed where a colored light should be, in a block signal, must be regarded as the most restrictive indication that can be given by that signal, except that when day indication is plainly seen it will govern.

When a block signal is out of order and not so indicated, or is improperly displayed, or working improperly, or light is out at night, report must be made from the first available point of communication to the chief train dispatcher."

"294. All members of train and engine crews must, when practicable, communicate to each other by its name the indication of each signal affecting the movement of their train."

"505. Automatic block signals govern the use of the blocks, but unless otherwise provided, do not supersede the authority of trains; nor dispense with the use or the observance of other signals whenever and wherever they may be required."

"509 (J). Except as provided in Rule 509, 509 (E) or 509 (F), when an automatic block signal indicates 'stop', train must stop and send a flagman ahead immediately, wait at least five minutes after he has started, and then follow, keeping at least one-fourth mile behind him until flagman reaches viewpoint as described in paragraph (g) or (h) of Rule 509 (F)."

97

"509 (K) "Flagman must watch for broken rails or other defects in track while preceding his train as required by Rule 509 (J).

"Except as provided in Rule 509 (E), when a train is proceeding after finding an automatic block signal displaying stop indication, enginemen must watch for broken rails or other defects in track.

"The engineer of a train entering a block under conditions described by Rule 509, 509 (f) or 509 (J), will be held responsible for an accident caused by encountering a train or obstruction in the block.

"When proceeding under provisions of Rule 509, 509 (F) or 509 (J), speed must not exceed twelve miles per hour until rear of train has passed out of block, or has passed a distant signal which was displaying proceed indication.

"509. When an automatic block signal indicates 'stop', train, without stopping, may proceed with caution, not exceeding twelve miles per hour, under the following conditions:

"(a) To enter siding where the switch is not more than one thousand feet beyond the signal and it can be seen that no opposing train has passed the home signal governing such opposing train; or that an opposing or preceding train has stopped, or is moving prepared to stop, clear of the route to be used.

"(b) To enter a yard when the switch is set for the receiving track and the route is clear to the fouling point of the switch.

"(c) To continue on the main track when meeting or passing a train when the view of track is clear to the point where fouled by the train which is taking siding, or when the engineer is informed by a member of the crew of the train to be met or passed that the stop indication of the signal is caused by the train to be met or passed being partly in the siding and not clear of main track.

"(d) To continue within the limit of a grade signal.

"509 (E). When an automatic block signal number plate is reversed, showing yellow, and signal indicates 'stop', train, without stopping, may proceed with caution through the block.

"509 (F). When an automatic block signal indicates 'stop', train, after stopping, may proceed with caution, not exceeding twelve miles per hour, under the following conditions:

98 "(g) On single track, when a preceding train is seen in the block, and in the intervening track is seen to be clear.

"(h) On single track, when view of track is clear to the end of block; or view of track is clear to a distant signal and such distant signal indicates 'proceed'.

"(i) On double track."

Mr. Ray, I am reading from page 7 of the Book of Rules the definition of caution:

"With Caution—To run at reduced speed, according to conditions, prepared to stop short of a train, engine, car, misplaced switch, derail, or other obstruction, or before reaching a stop signal. Where circumstances require, train must be preceded by a flagman."

It was stipulated that the taxable income of Jack Francis for the year 1944 was $4,121.64. It was further stipulated that his seniority as a brakeman commenced June 10, 1935.

RAY E. FRANCIS, a witness for plaintiffs, testified:

Direct Examination (by Mr. Black).

I reside in Ogden, Utah, and have been working for the Southern Pacific Company for 37 years as brakeman and conductor. Jack Francis was my son; his age was 30 years and about 5 months at the time of his death. At the time of his death he was working out of Carlin, Nevada, as conductor and brakeman. After his marriage, which took place in Washington, D. C., Jack and his wife lived in Ogden, Utah, for three or four years and after that in Carlin, Nevada. He was married before he commenced train service while he was in the C.C.C. I was well acquainted with Jack's wife, was in their home on numerous occasions; their home was very congenial, she was a good housekeeper. Jack's attitude towards his wife and little boys was the very highest. They built themselves a home after they moved to Carlin, doing most of the work themselves. Jack was very liberal and generous with his family. Jack spent the

money he made in taking care of his wife and children. She was a real mother, her home was neat, above the aver-
99 age. About all she did was take care of the children and her home. The children were always neat and tidy. The meals she prepared for the children were special all the time. I ate there quite a good deal myself, as I visited them about every trip that I made to Carlin. The little boys seemed to be happy, their home life was good. The little boys were in Carlin at the time of their mother's and father's death. Jack and his wife were in the rear Pullman, the Standard Pullman on First 21, at the time they were killed. I recognize Exhibits 2 to 8 as the pictures of Jack and his wife and children. The pictures contain fair likenesses of the members of this family; the little boy appearing on Exhibit 3 is Jimmy, the baby. All three of the children and their mother and father appear on four; the three boys and Jack on five; Jack and his wife and three boys on six, the three boys on seven, and on eight, the mother and her three sons. The pictures were taken about one or two weeks before Jack and his wife were killed, at Carlin, Nevada, near their home. Jack was very much of a home man; he built the home himself with the help of his wife and a few neighbors in his spare time.

Cross Examination (by Mr. Ray).

Just prior to the death of Jack and his wife they had been visiting with us in Ogden and were on their way back to their home in Carlin, Nevada, at the time of their death.

VIRGIL O. PACKER, a witness for plaintiffs, testified:

Direct Examination (by Mr. Black).

I reside in Collinston, Utah. I am the father of Mrs. Delphia Packer Francis. Delphia was 29 years old on December 3, 1944. At the time of their mother's death, the baby was three, the second boy six, and the oldest boy, eight years of age. After my daughter and Jack were married, I had occasion to visit in their homes in Ogden, Utah, and Carlin, Nevada. The home was kept in a very good condition. Jack did a very good job in building their home in Carlin during his spare time. Delphia took care of the

home very well and even helped build it, she did a lot of work herself. She took very good care of her little boys, was very much interested in their welfare. They both tried to teach the boys all they could, to bring them up in the proper light. Jack's disposition towards his wife and children was very good. He took a great interest in his wife and children. He was generous; he dressed his wife very good, the best he could afford to, and also the children. As far as I could see, he probably spent about all he made in taking care of his family and in building their home. Delphia and Jack took a great deal of pride in the care and attention they gave the children.

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100 Portions of the testimony given by Mr. W. J. BARTLE, District Master Car Repairer of the Southern Pacific Company, at the I.C.C. hearing held to investigate the collision at Bagley, Utah, in the early morning of December 31, 1944. This testimony was read into the record with the consent of counsel for the parties hereto.

I am Master Car Repairer, Northern District, Southern Pacific Company; have held the position 2½ years. Prior to that I held the positions of apprentice cabinet maker, car builder, mechanic draftsman, foreman, general foreman, master car repairer, Sacramento Division.

I made an examination of the cars that were damaged in the collision at Bagley. I have examined the records showing the construction of the equipment that was damaged in the collision. I prepared a record while accompanied by L. R. Schuster, Engineer of Car Construction, containing the results of my investigation. The cars were equipped with air brakes, most of them being AB brakes.

Mr. Black: This is testimony of the feet required to stop the train; that was why I was interested.

"18 cars 60 MPH full service 3375 ft. level.

"25 cars 50 MPH 2300 feet—old test.

"25 cars 60 MPH 3175 feet—old test."

Mr. Black: I don't care anything about that other.

"Mr. Bartle, did you make inspection and examination of the air brake equipment of the damaged cars in train 1/21?

"Yes, sir. Part of them. From the damaged Coach SP 1147 back to and including Pullman Standard Lake Cushman.

"What did that inspection develop?

"As follows:—"

Mr. Black: And then he describes there again the class of equipment in those cars.

"I would like to say at this point that the cars ahead of that position in the train had been moved forward before I had an opportunity to make any inspection.

101 "Let's start with the head end of 1/21. The first car damaged was UP Mail 2044.

"Yes.

"What was the damage?

"Damage consists of Coupler yoke, draft gear, draft gear stops, carrier iron mission west end of this car. Estimated damage $150.00. No brake test was made of this car on arrival at Ogden because of broken brake pipe.

"Was that draw bar that end of car pulled out or pushed in?

"Pulled out.

"That would indicate that train was in backing up movement, wouldn't it?

"My opinion that the collision started an emergency application from the rear end, and the drag of that rear end, with engine moving forward pulled it out.

"Indicated that engine moving forward?

"In my estimation, yes.

"*Lets* take SP 1147. Did you inspect SP 1147 Coach?

"Yes I inspected SP 1147 Coach.

"I believe that car was telescoped by the car at the rear of it which was SP 1264?

"Yes. SP 1264 entered Coach SP 1147.

"To what distance?

"45 feet."

"The drawbar or coupler rather in the west end of the 1264 was weaker than the coupler in the east end of the 1147. Is that right?

"Yes, that is right.

"The heavy damage to the 1147 by the 1264, these cars being of equal strength, was apparently due to the strong part, which was the underframe of the 1264, striking the weak part, or superstructure of the 1147. Is that right?

102 "I wouldn't say it was a weak part. The superstructure of the 1147 is an older car than some of the others in the train, but it was designed of the best engineering practice. However, the superstructure above the floor line would not be on the same strength of the underframe.

"Therefore, it could be called the weaker portion compared to the underframe?

"The underframe in any car is superior to the superstructure.

"The underframe of the 1264 struck and damaged the superstructure of the 1147?

"That is right.

"SP diner 10102. Would you say that was the strongest car in the train?

"Would say the pullman was comparable. The 10102 is the very latest design and the superstructure is comparable with any car in the train.

"Was the 10102 diner telescoped by pullman tourist car 4263?

"Yes.

"What was the depth of the penetration?

"45 feet.

"What is the relative strength of those two cars?

"I would say they are comparable."

"—stronger portion of one car striking weaker portion of the other, as developed in connection with the 1147 and the 1264, if they were applied to these two cars, would your answer be the same?

"No. Except in the case that the stronger portion of the car entered the weaker portion of the other. But as far as the coupler would be concerned wouldn't have made any difference what kind of couplers it had. Coupler draft gear stop on the east end of diner was broken and kicked out. The coupler which was a heavy coupler on the east end of the diner had been shifted back into the truck frame. It could have happened had it been a tite-lock. To all the other questions in connection with the superstructure my answers are the same as in the previous instance for the two coaches."

103 "Cars 1147 and 1264 were the 12th and 13th cars in the train. Was there any damage to the 14th car?

"The 14th car was UP Coach 1251. The coupler head was slid vertically through the top section of head on east end.

"Would you say that the car was only slightly damaged?

"Yes, I would.

"Did it stay on the rails?

"Yes, it did.

"Now the 17th was the Fallon. It was only slightly damaged, wasn't it?"

The Court: Let me ask you, is he counting from the engine back?

Mr. Black: From the engine back as I understand it, Your Honor, and he is only counting damaged cars. There were several that weren't damaged.

The Court: He said the 17th car from the engine?

Mr. Black: From the engine.

"On the east end of the Fallon the coupler head was slid vertically through the top section. The shank was not damaged, the yoke, draft gear not damaged, the center sills were sprung back of the draft stops on the east end.

"How was the west end?

"The car had a 'D' coupler. The shank and the head were bent downward, center sills were *spring* back of draft stops. There was no damage to the superstructure.

"The 1147 and the 1264 were not derailed, were they?

"No.

"How many cars of 1/21 were derailed?

"The lead truck of tourist 4263, middle pair and back wheels of the lead truck were derailed. None of the others were derailed except the rear truck of the Pullman Lake Cushman, which was demolished.

"Will you state how far the engine penetrated the Lake Cushman?

104 "Approximately 13 feet from the east end.

"Have you listed all of the cars that were derailed in 1/21?

"Yes.

"How many were there?

"Just one car, and the destroyed truck on the east end of the Cushman.

"Do you account for that fact by the shock being absorbed by the telescoping of these other two cars, causing none of the others to derail?

"Probably an emergency application of brake had locked everything on that first train and with two cars jumping above the weak position of superstructure, naturally it dissipated the force, tending to slow up any derailing action.

"If these cars hadn't telescoped, other cars would have probably derailed?

"Yes. They would have had to go either upwards or sideways."

SIMON MORTON WELSH, a witness for plaintiffs, testified:

Direct Examination.

I reside in Ogden, Utah and am a railroad conductor employed by the Southern Pacific. I entered train service first in 1907 and for four years since that time I have been out of service or engaged in track service as a foreman. I have had about thirty-five years experience in train and yard service. I was promoted on the Southern Pacific to conductor August 15, 1919. Before that I was a brakeman. I commenced working for the S. P. in June of 1917. Before that I had been employed by the Denver & Rio Grande and the Union Pacific and the Oregon Short Line. I am regularly assigned at the present time to Train 21, Ogden, Utah, to Carlin, Nevada, and returning from Carlin, Nevada to Ogden, Utah on Train 22. I have been a passenger conductor for about 3 years. For many years I worked as a brakeman and conductor in freight service. During the 35 years that I have been in train service, I have served occasionally as conductor on passenger train and for about 6 months I was regularly employed as a brakeman in passenger service. I have served on all of the regularly scheduled freight and passenger trains operated by the Southern Pacific out of Ogden, including the streamliner.

During the years that I have worked as a brakeman and conductor, I have studied the available literature on the air brakes and other equipment known as safety appliances used on passenger and freight trains. In addition to being employed by the railroad company up until 3 years ago I held various offices with the Brotherhood of Railroad Trainmen, as a grievance man and for 10 years as a legislative representative for the State of Utah. I have occasionally attended meetings of safety committee as an observer and participated somewhat in their discussions.

105 Q. Mr. Welsh, during the years that you have worked in train service you may state whether or not you have observed and experienced what is known as slack action.

A. Yes, all trains have a certain amount of slack action, which is essential for proper operation of starting and stopping trains.

Q. And what causes and produces this slack action, Mr. Welsh?

A. In freight cars there is what is known as free slack which is the normal play in the knuckles of the couplers and in both freight and passenger service you have also what is known as spring slack action, a compressing of the draught gear springs.

This is necessary because in starting a train, the first car moving forward is moved, started at a certain rate of speed and as the pull is made on the second car, the springs are compressed, which relieves the equipment of a shock that would otherwise be prevalent were it not for these springs.

The same applies in stopping trains being stopped from the application of the brakes or any retardation of the engine. The first car is the first to reduce the speed and the second car then compresses the draught gear as it comes against it and cushions the shock and so on back through the train to the last car.

Q. If it weren't for the slack bunching somewhat behind the locomotive, especially on grades, the locomotive wouldn't be able to start the train, a heavy train, would it?

A. No, it is necessary with a steam locomotive because you have the direct or indirect drive where on a diesel locomotive because you have the direct or indirect drive where on a diesel locomotive or geared locomotive you have the direct drive and the full traction effort. With a steam locomotive side rods it is necessary to start the engine and get some momentum.

Q. In other words, Mr. Welsh, because of this slack action you can to some extent start one car at a time as the train moves forward and because of the slack action to some extent you can stop one car at a time?

A. You can reduce the speed and eventually stop the car and the springs located in the draught rigging cushion the shock.

Q. What is the nature of the slack action produced by a stopping of a train when the head end is moving the slowest?

A. That is what is commonly referred to as the
106 bunching or compressing of the slack.

Q. Some of the boys call it the running in of the slack?

A. Yes, bunching of the slack or running in of the slack.

Q. That is when the slack piles up behind the locomotive?

A. That is right. The locomotive reduces the speed ordinarily—if the stop is made or reduction of speed is made by the engineer—the engine is the first to reduce speed where the throttle is not used.

Q. Now, the running out of slack takes place when the head end is going faster than the back end, is that right?

A. That is true. When the train starts from the locomotive, it increases the speed, the next car follows suit and so on through the train, and this stretches out the slack movement.

Q. And, of course, sometimes the slack action can be rather severe, can it not, either the running in or running out of the slack?

A. That is very true if there is any faulty equipment, air brakes, or the improper handling of them.

Q. Mr. Welsh, will you describe briefly and generally and not in detail the usage and the operation of the automatic air brake system on a train?

A. The automatic air brake system consists of a pipe passing underneath each car with a branch pipe diverging somewhere near the center of the car to the triple valve, auxiliary reservoir, emergency reservoir, and the brake cylinder. And when a reduction is made from the brake pipe by the engineer or from any other source, it withdraws the pressure from the brake side of the triple valve, brake pipe side—correction—the normal pressure being equal when the train is fully charged in the auxiliary reservoir in the brake pipe side.

When the air is withdrawn by the enginer or by any other

source, such as a rupture in the brake pipe, the pressure being greater in the auxiliary reservoir moves the triple valve out, opening a port, permitting the air to flow from the auxiliary reservoir into the brake cylinder, pushing out a piston which is connected with rods and brake beam, and the brake shoes in contact with the wheel, which when pressed against the wheel results in friction, retarding the speed.

107 The reverse movement in releasing the brake is the air from the compressor, being controlled by the engineer with the brake valve, pumps back into the brake pipe a flow of air which moves the piston of the triple valve back toward the auxiliary reservoir and closes the port of entry from the auxiliary reservoir into the brake cylinder and opens the port which permits the air that is in the brake cylinder to escape through a port to the atmosphere, thus releasing the brake.

Q. The point is that when the air pressure is released in the locomotive that causes the brakes to set clear back along the train?

A. If they are working normally the brakes are set on the first car first and second, third, and so on consecutively.

Q. Is that true in the event of an emergency application of air power in the locomotive?

A. If applied, if the emergency—if the brake valve is placed in the emergency position, which is the largest opening or port of the brake valve, the emergency will apply upon the first car first and it is necessary that all of the brakes work consecutively or nearly so as the quick action of the triple valve on the first car withdraws the air so rapidly from the second car that it acts likewise, and so on through the entire train unless the rapid flow is interrupted or runs out through the branch pipes being cut out or the brakes made inoperative on three cars or more consecutively. Then the sudden withdrawal of air from the following triple valves on account of the friction in the brake pipe on three cars will reduce the rapidity of the flow so that beyond that point you will not obtain an emergency application.

Q. In other words, the setting of these emergency brakes as they run backward from the engine, each brake depends

on the operation of the brake ahead in the car ahead?

A. That would be true, yes, when the emergency application is made from the engine. With the withdrawal of the air suddenly from any other portion of the train, assuming in the middle of the train, then the consecutive action would run in both directions.

Q. Both directions?

108 A. That is true.

Q. From the point of release?

A. That is right, where the air is escaping from them very rapidly.

Q. The point you make is if a train consists of a locomotive and 20 cars and the emergency application would be made in the engine or in the front end, then the brakes would be applied consecutively throughout the train?

A. That is true.

Q. Couldn't be applied instantly in all the cars at once?

A. No, there is an element of time which in emergency application is very, very slight, but still there is a space of time between each car.

In standing out to one side where air goes into the emergency or is put in the emergency, there is a certain portion of the air which is blown to the atmosphere at each triple valve and you can see the dust kicking up from each car as it comes back. It is very rapid but there is an element of time.

Q. The kicks are made one after the other—

A. That is right.

Q. —as the brake pressure goes backward throughout the length of the train?

A. As the air is withdrawn from each triple valve.

Q. And as I understand it, the idea is that the triple valve in the first car because of the rapidity in the reduction excites the valve behind it and throws that into emergency and that process is repeated clear back the length of the train?

A. That is true.

Q. But it is consecutive—

A. That is right on the automatic brake.

Q. Yes, on the automatic. What is the difference in that

regard between the automatic application of brake power and the heavy service?

A. A heavy service is a gradual and continuous withdrawal of the air from the brake pipe.

Q. Explain how the brakes would be set up in a train of 20 cars by a heavy service application.

A. If the brakes are all in good condition and the
109 triple valve moves at the same reduction of two to five pounds usually, then the brakes will set up consecutively from the first car to the rear at a slower rate of speed than in the emergency.

Q. But this consecutive setting of the brakes that you have explained in relation to the emergency application is also true of the heavy service?

A. Of any service.

Q. Of any service. The first car's brakes would be set first, second, third, all the way out?

A. That is true.

Q. Mr. Welsh, have you made any observation and study with reference to the matter of braking efficiency as influenced and affected by train speed?

A. Yes, I have made considerable study and have procured from reliable and authentic sources, such as the American Air Brake Association and the Westinghouse and New York Air Brake, dealing with those subjects—

Q. You procured information from those sources?

A. I considered those reliable.

Q. What is the effect then of speed upon the efficiency of the braking power and the operation of the brakes?

A. All things being equal, a speed of ten miles per hour, if a car or train at that speed would be stopped in a certain specified distance and you increased that speed to 20 miles per hour, it would take four times the distance, everything else being equal, to stop the train. At 30 miles per hour it would take nine times the distance. At 40 miles per hour it would take 16 times the distance. And at 50 miles per hour, it would take 25 times the distance.

Q. In other words, Mr. Welsh, the greater the rate of speed the less the braking and retarding force efficiency of the brakes?

A. That is true. As the speed reduces the same pressure applied between the brake shoe and the wheel would retard—

Q. I imagine, Mr. Welsh, at some speeds the air brakes, automatic air brake system in a train could stop it instantly or practically instantly, is that true?

A. It would have to be a very low rate of speed and it would depend largely upon the kind of cars, the weight of the cars for the reason that you have the same braking power upon an empty car that you do upon a loaded one.

For instance, if you had a car that weighed 50,000 pounds and you placed a load upon it of 100,000, which is generally the capacity of cars of that weight, it would take three times the distance to stop it.

Q. I understand that, but I mean if the speed is low enough these air brakes would overcome all of the momentum at once, wouldn't it, or practically at once?

A. Yes, at the lower rates of speed, the stopping distance is very, very short. At one mile per hour there would be no perceptible movement from a 70 pound brake pipe pressure as carried in freight trains and 90 usually in passenger—there would be no perceptible movement, perhaps an inch or two.

Q. By the way, one question I overlooked asking in my introductory examination: About how much slack would you say there would be in each pair of couplers in a passenger train?

A. In a passenger train that has good equipment, I would venture to say it would not exceed four inches of spring slack. With passenger equipment you have a buffer which holds the free slack as the couplers are like this (indicating). A buffer above it has springs. In that case it is necessary in order to couple two passenger cars together to force these buffers back against the springs before the coupling will make. Therefore it at all times holds the free slack there unless it is further compressed.

Q. So, in a passenger train of 20 cars, tender and locomotive, there wouldn't be any more than 8 feet of slack in the whole train, would there?

A. How many?
Q. 20 cars.
A. How many inches of slack?
Q. More than 8 feet, 96 inches, in 20 cars.
A. No, with good equipment I don't think your slack would exceed over 7 feet—84 inches. That would be
111 about four inches or a little better, to the car.

Q. Now, Mr. Welsh, getting back to the point of my examination when I interrupted a second ago, supposing that a train is moving, say, 8 or 12 miles an hour and there is a sudden emergency application of brake power, what effect would that have upon men standing at the rear end of the train? Now, it is going 8 to 12 miles an hour.

A. What size of train, Mr. Black?
Q. 20 car passenger train.
A. 8 to 12 miles per hour I would say that the train would stop at about the time that the air brake had applied on the 15th car and you would have the slack in the five cars that would come to a dead stop in striking the 15th car before the brake was applied.
Q. Would such a stop produce a shock, what is known as a shock?
A. That is right.
Q. What is a shock? What do you railroad men consider to be a shock occurring in the operation of a train?
A. Well, I would like to—
Q. You have a definition of it, don't you?
A. I have a definition as put out by the American Air Brake Association that I have reference to. I might add at this point, Mr. Black, that during my period of employment with the Southern Pacific, for one year or approximately that period of time I was employed as the division Examiner of Rules and instructor upon those rules to the new employees being employed and to those being newly promoted in the service.
Q. And the definition of shock you are about to give us, does that correspond to your idea of what a shock is and what is generally understood to be a shock in railroad language?
A. I think the language used in this treatise that I refer to is the most nearly correct—

Mr. Ray: I am going to object to this as immaterial and irrelevant what somebody defines the word "shock" to mean.

Mr. Black: Well, he says the definition he is about to read corresponds to his idea of what shock is.

Mr. Ray: That is immaterial whether it does or not.

112 By Mr. Black:

Q. Can you tell us in your own language what you consider a shock to be?

A. Shock is a sudden changing of speed from fast to slow or from slow to fast depending upon the difference in the variation of speed as concerned with the time element involved.

The Court: Don't you mean when you ask the question, Mr. Black, the pitching forward of passengers, say?

Q. Now, what effect would shock have upon a passenger, man or woman, standing back in the rear end of the train or any portion of the train, for that matter?

A. If it were stopped on the head end, the slack would bunch rapidly, causing a shock to the rear car and any person standing in that car would be moved forward. The speed with which he would be thrown or if he was able to run, self-recovery would depend largely upon the suddenness of the reduction of speed or the stopping speed.

Q. Now, Mr. Welsh, calling upon your many years of experience and training that you have had and the observations you have made in train service I will ask you to state whether or not you have an opinion as to whether or not a shock could be produced in a passenger train travelling between 50 and 65 miles an hour by the sudden application of the automatic brakes in emergency?

A. You refer to the shock on the rear of the train?

Q. Yes.

Mr. Ray: I object to that as incompetent. The witness doesn't show that he has any knowledge of that subject over and beyond what the jury has.

Mr. Black: I don't suppose there is a man or lady on the jury that has ever ridden a train under those circum-

stances or ever had any comparable experience to this witness.

Mr. Ray: We know as common knowledge that if we are moving rapidly and we suddenly stop whether we are in a train, elevator or what else, something happens to us.

Mr. Black: Your Honor, maybe then this witness's experience on trains is a little different from Mr. Ray's and if that is his idea I am sure the testimony is competent.

113 The Court: What are you trying to show by him?

Mr. Black: I am trying to show, Your Honor, by this witness that the application of those brakes in emergency on a train traveling that fast would not produce a shock.

The Court: And by "shock" you mean it wouldn't pitch the people that were in the car?

Mr. Black: That is right. That a brakeman standing in the rear end of that train with a cup of coffee in his hand or anything else could ride it out on his feet without feeling the force of the shock at that speed.

The Court: Well, one witness testified he was drinking coffee and it was knocked out of his hand.

Mr. Black: Yes, the question as to what knocked it out of his hand is the thing the jury is to consider, Your Honor. The application of the brakes didn't knock it out of his hand. When he felt the application of the brakes he set his coffee aside, it never was spilled or lost at all, he hadn't dropped a drop of it.

The Court: What are you trying to prove by this witness, what did knock the coffee out of the witness's hand except the stoppage of the train?

Mr. Black: Your Honor, this testimony is important on the matter as to whether or not the shock that these boys felt, Welch felt, Russell felt, Altman felt and Cook, was caused by the impact or caused by the application of braking power. That is the significance of this testimony, Your Honor.

The Court: Are you trying to prove or proposing to prove by this witness that the application of the brakes would not affect the passengers or the employees on the train?

Mr. Black: Wouldn't produce a shock such as to throw them down and they could ride it out.

The Court: That is, you want to prove that the impact did it?

Mr. Black: Yes, Your Honor, I want to prove that the impact did it.

The Court: Well, I think that you men are agreed on that.

Mr. Ray: I don't think there is any doubt there was an impact there. The train stopped.

114 The Court: That is what you say, too, isn't it?

Mr. Ray: That is right.

The Court: So that there is not any objection to making that proof. I think you are agreed on that proposition.

Mr. Ray: We are certainly going to contend when these two trains came together it upset these people in the back of the train.

Mr. Black: Well, we would like this proof, Your Honor. We deem this to be very material and very significant.

The Court: Yes, well, you are not objecting to making that proof, are you?

Mr. Ray: I don't think this man is competent to make it, but in the interest of time, let him go.

Mr. Black: Thank you, Mr. Ray.

By Mr. Black:

Q. Do you have the question in mind, Mr. Welsh? The train traveling in the vicinity of 60 to 65 miles an hour, a passenger train consisting of a locomotive, tender and 20 cars and while traveling at a speed of 60 to 65 miles an hour there is a sudden application of the automatic brakes in

emergency; would that produce a shock at the rear end of the train?

A. Not any perceptible shock, no.

Q. What effect would that application of braking power under those conditions have upon the equilibrium and balance of men in the rear end of the train?

A. It would start at that speed to slowly reduce the speed of the train and naturally as you reduce the speed of the train, the brakes of course do not apply to a man standing and it naturally has a tendency to move him forward depending upon the severity of the reduction of speed.

Q. Now, isn't this true, Mr. Welsh, as a matter of fact and experience that as the brakes are applied the rate of reduction increases as the speed of the train decreases?

A. Oh, absolutely.

115 Q. So then the smallest and slightest amount of decrease in speed that you would have would be at the instant the brakes were applied?

A. That is true.

Q. And the rate of decrease of speed and retardation would increase as the speed of the train decreased?

A. Certainly.

Q. Mr. Welsh, from your experience do you have any opinion as to the length of time that would be required for the slack to run out of a train consisting of 20 cars, an engine and tender and bunch behind the engine providing that the train while moving at a rate of speed of somewhere between 50 and 60 miles an hour crashed into the back of another train consisting of 18 cars, tender and locomotive, moving at a speed of anywhere from 5 to 6, 7, 8 miles an hour; how long would it take the slack to bunch behind that engine if it did strike such a train moving at that rate of speed?

Mr. Ray: I don't think he has enough factors in there to justify him telling us that. That is one of the imponderables in this case for the jury to determine.

The Court: I am inclined to think it would be better for you to have him lay down the general principles and let the jury decide because you are asking in effect for the witness to decide the case.

Mr. Black: No, I am not asking him to decide the case. I am asking his opinion of what length of time it would take that 7 feet of slack to run out.

The Court: Under those conditions?

Mr. Black: Under those conditions, and that is the evidence in this case.

The Court: If he has some expert idea about it he can give his opinion as to that.

Mr. Black: That is what I asked.

By Mr. Black:

Q. You may state your opinion, Mr. Welsh.

A. Traveling at 60 miles per hour a train is traveling at approximately 90 feet per second, and the slack of 20 cars, 4 inches to the car, would be 80 inches or 7 feet—it would I think be less than 1/10 of one second.

Q. For the slack to run out?

116 A. To run in.

Q. To run in I should say. Now, supposing, Mr. Welsh, that as a result of that collision the air brake pipes were ruptured in the vicinity of the very front part of the engine and as a result of that rupture in the air brake the emergency application would start to run back. Do you have an opinion as to whether or not it would be possible under those circumstances for anybody on that train to experience any sensation whatsoever with respect to the setting of the air brakes?

A. No, because the application of the air brake in that length of train I would estimate would take in emergency about one and one-half seconds to reach the rear end and apply, and with the impact, anyone in that car would be either falling or fallen and would be trying to grasp at anything within their reach for self-preservation and would not be conscious of any application of the brakes whatever.

Cross Examination (By Mr. Ray).

Q. One or two questions: You have had no experience with Southern Pacific in engine service, have you?

A. No, sir, not other than riding upon the engines and observing the actions of the engine crew.

Q. And it is those in engine service that normally control the air brakes, isn't it?

A. That is the normal procedure, yes, sir.

Q. Now, you have in mind from the question that was put to you, one train moving 60 miles an hour, I think that is the figure, and it strikes another. The movement forwarded is immediately retarded isn't it, if it strikes an object big enough to influence it?

A. That is true.

Q. In our experience the only example we have of a rapidly moving object stopping at once is when one of these airplanes hits a mountain, that stops at once, doesn't it?

A. About as near, I guess, that example would apply as any I know of.

Q. There is no way to stop an automobile or a train, reduce its speed from 60 miles an hour to zero at once, is there?

A. Well, if a locomotive struck the same object that the airplane struck, a mountain, I would presume—

Q. But that doesn't happen.

117 A. I have never observed it.

Q. So that there is a certain amount of time, a time interval, a space interval in occurrences such as you have in mind during which the speed is reduced from 60 miles an hour to nothing?

A. That's right, there is an element of time involved, of course.

Q. So that if after the locomotive going at 60 miles an hour strikes another object as solid as a train and it rides it along for say 500 feet, 800 feet, the space element there is five or eight hundred feet during which the speed is reduced from 60 miles an hour to nothing, isn't it?

A. It depends upon the distance traveled and the speed, of course. From 60 miles per hour to the stopping point varies, of course, a variable distance.

Q. There couldn't be any question about this, could there, Mr. Welsh: If a train going 60 miles an hour strikes another train and then continues to run for 800 feet and stops, that there was a space of 800 feet during which the speed was decelerated from 60 miles an hour to nothing?

A. Yes, 800 feet. From 60 miles an hour to nothing would perhaps require a figure in the vicinity of 30 miles an hour which for the average of whatever distance it ran would be 45 feet per second. 45 into 800 would be somewhere in the vicinity of 15 seconds or such a matter if it traveled 800 feet.

Q. Well, you are assuming, if I understood you mental calculations there, Mr. Welsh, that if the collision occurs at 60 miles an hour and the speed is reduced to nothing in 800 feet, then you would strike an average between 60 miles an hour and nothing and assuming for rough calculations that half of that would be the average speed—

A. That is true.

Q. —covering that 800 feet. Now, that may be a fair assumption. Would it be influenced to some extent by the fact that cars are being pitched out of the train here and there during that 800 feet?

A. The striking train I presume you refer to, the one that struck the other one?

Q. The one that struck the other one loses a car
118 here and there during that 800 feet. That might to some extent alter that average of 30 miles an hour?

A. That is true. There is no question but what if a car buckles out of the train or is derailed and goes in the air and doesn't continue the pressure on the locomotive to force it still further that is true.

Q. And if the cars buckled out between the locomotive and the last car, that would mean the last car would have more room to keep running than the locomotive would have, wouldn't it?

A. That is true.

Q. Now, if you take your assumption again for the moment that the impact comes at 60 miles an hour and the momentum is entirely spent in 450 feet—I want to use that figure for a moment because you suggested it—then you had an average of 30 miles an hour for 450 feet, didn't you?

A. That is correct.

Q. And that would take ten seconds?

A. Correct, based on the 30 miles an hour speed.

Q. Yes, assuming the validity of your use of an average is not destroyed by factors that we can't evaluate because of the tossing out of cars along the way. You are using

that because there may be factors that you can't possess, is that right?

A. Well, to make an absolute decision you would have to have all of the factors.

Q. Yes, and it would be quite impossible to get them, wouldn't it, unless you were there with instruments and stop watches?

A. I don't know of any way you could obtain them regardless of what instruments or other—I think it could perhaps be developed from the marks of where the locomotive first struck the object from particles.

Q. But you were content to rest your conclusion on this average as being the safest thing that is available to you?

A. Well, not having the knowledge of the distance—I have no knowledge of the distance in question that the locomotive traveled after the point of impact. I don't have that, Mr. Ray. I don't know just how far that engine intruded.

119 There is one point, Mr. Ray, that I think might be given consideration was whether the object struck was moving and if so if the air pipes were broken on that at a very low rate of speed. It would almost immediately, say, at three or four miles an hour, with the application of those brakes would set solidly that train, freeze the train, that was the leading train.

Q. I think you may make that assumption. Did you hear the testimony of Mr. Bartle this morning?

A. I attended as the representative of both the Orders of Railway Conductors and the Brotherhood of Railway Trainmen at both hearings, the Interstate Commerce Commission that is referred to—

Q. We are concerned here only with this one you heard testify this morning.

A. I heard part of it read, Mr. Ray, and I stepped outside.

Q. In which Mr. Black read the statement of the witness that the front train was in emergency almost immediately as the result of the rear end collision?

A. Yes, I heard Mr. Bartle testify that fact.

Q. And Mr. Ware, who was the engineer on that train,

testified that his air was gone—the instant he felt an impact he looked at his gauge and the air was gone, so that means those cars were in emergency, doesn't it?

A. That is right.

Q. And that when the collision occurred at the back end of that train, the application of the brakes at that point was almost instantaneous?

A. That is true. Dealing with that particular feature of the distance, Mr. Ray, I recall very vividly some slight variation of the point where the engine of first 21 stood behind the freight train, varying, I believe, from three to five car lengths.

Q. Well, I was using figures for illustrative purposes with you. I think the evidence in this case is 500 feet with respect to that last car but I was using illustrative figures.

Redirect Examination (By Mr. Black).

120 Q. Mr. Welsh, in responding to the hypothetical questions addressed to you by Mr. Ray, where you were speaking of the matter of the collision occurring when the following train was going 60 miles an hour and then the end of the train traveled some 500 feet before all of the various cars came to rest, you wouldn't have any idea, would you, as to how many feet that rear end traveled 60 miles an hour or how many feet it traveled at one mile an hour?

A. I would not have that information, no, Mr. Black.

Now, Mr. Ray, on this matter we spoke of yesterday, do I understand that if the Westinghouse expert were here he would testify that a passenger train consisting of an engine and tender and 20 cars, traveling at 65 miles per hour, could be stopped by a full emergency application of the air brake power in approximately 2800 feet?

Mr. Ray: That is right.

Mr. Black: And traveling at 60 miles an hour in approximately 2280 feet?

Mr. Ray: That is right.

Mr. Black: And at 55 miles an hour in approximately 1760 feet?

Mr. Ray: That is right.

Mr. Black: And at 50 miles per hour approximately 1340 feet?

Mr. Ray: That is right.

Mr. Black: And at 40 miles an hour in approximately 1050 feet?

Mr. Ray: That is right.

It was stipulated that if Mr. R. N. Booker, the general road foreman of engines employed by the Southern Pacific Company, were in court and sworn as a witness, he would testify that he examined the scene of the accident and the various equipment involved and that he would among other things testify that considering the length and weight of the train, Second 21, the grade and probable condition of the rails, and that the train was traveling approximately 60 miles per hour, to bring the train to a stop with a heavy service application of brake power, would require a traveling distance of between 3500 and 4000 feet, and that an emergency application would cut that down about 20 per cent, that would be from 2800 to 3300 feet.

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121 IRENE D. FRANCIS, a witness for the plaintiffs, testified:

Direct Examination.

I reside in Ogden, Utah, am the wife of R. E. Francis and the mother of Jack Francis. I was well acquainted with Jack's wife, visited them in their homes in Ogden and in Carlin, Nevada. Jack was generous with his wife and three boys, all he made was spent on them. He was devoted around the home, his habits were excellent. His wife was a very hard worker and an excellent housekeeper. She had the meals on time, whether Jack was there or not, and took excellent care of the children and was greatly interested in the moral and mental growth and development of the little boys. She was interested in her children's schooling and

their environment. At the time of her death she was president of the Parent-Teachers' Association and held an office in the Brotherhood of Railroad Trainmen Auxiliary.

ORPHA M. PACKER, a witness for the plaintiffs, testified:

Direct Examination.

I reside in Collinston, Utah; am the wife of V. O. Packer and the mother of Mrs. Jack Francis. I visited in the home of my daughter and son-in-law; was with my daughter when each of her children were born. Two years ago this summer I lived with her three months in Ogden and stayed at her home; I admired my son-in-law very much; I thought he was the most conscientious father. When he was home he wanted the boys with him to help take care of them and relieve his wife of the responsibility and he tried to give them everything he could. He was willing to take them to shows, or see that they went to circuses or things of that sort. He just lived mostly for his family. He was very conscientious, he wanted his boys to be very proud of him and he tried to set an example that they would be proud of and admire as they grew older.

In my opinion my daughter was a very good housekeeper and a very conscientious mother. She tried to do the best she could and to set a good example to her children and teach them properly. She took a great interest in the children and their little friends; she wanted her children dressed very nicely and their bedding and clothing and everything to be clean and well taken care of. She would change their clothing and clean them up when I really thought they didn't need it, but she was so afraid they would have a spot of dirt on them, and her own had to be spotless most of the time. She devoted her full time to the affairs of her home and to her boys. At the time of her death the older two boys were in school. The baby was not yet three.

122 Thereupon the plaintiffs rested.

The deposition of DR. FRANK B. QUEEN, taken in another case, was read into the record and pursuant to stipulation.

I am stationed at Bushnell General Hospital, Brigham City, Utah. I have been there since October, 1942, and am a lieutenant colonel in the United States Army. Since being at Bushnell I have been Chief of Laboratory Service; previous to that, Chief of Laboratory Service at O'Reilly General Hospital, Missouri.

I graduated from Washington University School of Medicine in 1929; spent a year rotating internship at the Geisinger Memorial Hospital at Danville, Pennsylvania; was Assistant Resident in Pathology at the University of Rochester School of Medicine for two years; held Commonwealth fellowship in kidney research at the University of Pennsylvania for one year; was three years Commonwealth fellow in pathology at the University of Colorado; two years as instructor in pathology at the University of Colorado; and from 1938 to induction into the Army in 1941, was Assistant Professor of Pathology at Northwestern University, Director of the Patterson Foundation for Cancer Research; Director of Laboratory at Passavant Memorial Hospital, Chicago; and Associate Director of the Tumor Clinic of Northwestern University.

Since the pathologist left the Thomas Dee Hospital in Ogden, Weber County, Utah, I have been interpreting some of the surgical slides and making an occasional autopsy for staff members when they requested it. A pathologist is one of the medical specialists whose major activity is concerned with interpretation of abnormal physiology. We routinely examine and interpret all surgical specimens removed, do autopsies, and consult with the various clinical specialists on problems on which our consultation is asked. I have performed certainly more than 2500 autopsies, but the precise number I couldn't state.

On January 1, 1945, I performed an autopsy upon James McDonald, engineer for the Southern Pacific Company, at Kirkendall-Darling Mortuary in Ogden, Utah. Dr. Wendell J. Thomson, Dr. F. K. Bartlett and my secretary and a mortuary attendant, whose name I do not know, were present. Mr. Darling was also in and out. Dr. Bartlett was a family

physician of Mr. McDonald and was present at the request of Mrs. McDonald.

123 Q. Now, as a result of that autopsy which you performed upon the body of Mr. McDonald, what did you find and observe?

A. The principal findings were advanced coronary arteriosclerosis with hyaline occlusion of the left descending coronary artery; a fibrosis of the myocardium of the left *centricle*, including the adjacent septum; and a desquamation of the epidermis over the anterior and lateral thorax, arms, hands, anterior thighs, and lower legs. Those over the thighs and legs were superficial and inconsequential.

Q. Now, when you speak of this desquamation of the epidermis, which I take is a medical term, what is meant by that, Doctor?

A. It means that the superficial portion of the skin is loosened and commonly results from burns, either from steam or external heat in any form.

Q. Did you find any desquamation of the *epidermis* with respect to parts of the body which were protected by, say, clothing or by shoes or otherwise?

A. None in the parts that were protected by shoes, and minor burns in the regions that were generally protected by clothing. Those of the chest, of course, should have had clothing over them, but this was the region where the burns were the most extensive. Since the body was unclothed when I first saw it, I do not know the state of the clothing at the time these injuries were sustained.

Q. What, if anything, did you observe with respect to the mandible right?

A. This was fractured; a simple fracture existed.

Q. And for the purpose of the record, Doctor, what is meant by the term, "mandible right"?

A. That is the lower jaw bone on the right side.

Q. Did you find any other fractures of any other bones?

A. Yes, sir. There was a compound fracture of the left tibia.

Q. And what is meant by the term, "tibia", Doctor?

A. That is the small bone in the lower leg.

Q. Did you make any other observations or findings with

respect to the person of this decedent upon whom you performed the autopsy?

A. Yes, sir, but all of the other findings were of incidental or secondary nature, that is, secondary to the
124 age of the patient or to previously existing infections, and we considered that none of these had anything to do with the accident or the cause of death.

Q. Now, as a result of this autopsy, were you able through your training and your experience to reach a conclusion as to the cause of the death of the person upon whom you performed the autopsy?

A. Yes, sir.

Q. And what was the conclusion which you so reached?

A. The conclusion was that the man died of coronary occlusion and heart failure.

Q. Were any of these injuries or fractures in your opinion sufficient to cause the death of this person?

A. I don't think that any of them are sufficient to be a primary cause of death. One cannot state that they were not contributory through the mechanism of "shock" or in some other means, but ordinarily one would not consider these injuries to be adequate to account for death.

Q. I believe you spoke of the desquamation of *epidermis* which you observed upon the person of this deceased?

A. Yes, sir.

Q. I believe you also stated that those were caused by burns, did you say?

A. By external heat, yes, sir.

Q. By external heat?

A. Yes, sir.

Q. Now, Doctor, by reason of your training and your experience, were you able to determine whether those burns upon the person of this deceased which you observed were inflicted before or after death?

A. Yes, sir. We made microscopic sections in various areas with the object of determining whether there was any evidence of reaction at the site of injury such as normally occurs when living tissue is subjected to heat. There was no such evidence. Therefore we concluded that these burns had resulted at the time of death or before the time of death, but that the patient was not alive, or certainly did not live any appreciable time after the burns were sustained.

Q. You spoke, Doctor, of the tests you made upon
125 the tissue to determine whether there had been any reaction, cellular reaction?

A. Yes, sir.

Q. What are the usual or expected reactions, cellular in character, where heat is applied or burns are inflicted upon living tissue?

A. Probably the first thing is capillary thrombosis with immediate extravasation of red cells into the tissue about the capillaries; and immediately following this, there is a leukocytic infiltration of the injured tissue.

Q. Did you find any of those present?

A. No, sir.

Q. In your testimony, Doctor, you have employed the term, 'coronary occlusion'; what is meant by a coronary occlusion?

A. The coronary arteries are the large arteries supplying the heart, the heart muscle, with blood. The term, 'coronary occlusion', is commonly understood to mean that the lumen of such an artery is stopped with something.

Q. Would the existence or presence of a coronary occlusion be detectable and observable before death?

A. That is an extremely difficult question to answer and you can't give a yes-or-no answer. Usually they are, but there are plenty of proved cases where the best diagnostic tests to date do not reveal such.

Cross Examination.

Q. Doctor, in speaking of the cause of death as a coronary occlusion and heart failure, were you able to determine at what precise moment of time this occlusion and heart failure occurred?

A. No, sir. One can't determine that.

Q. Could you tell whether it was a minute or an hour before the time of the actual collision of these trains that were involved in the accident?

A. No, sir. One could not state that from the evidence we have.

Q. Now, given the condition which you found here of coronary occlusion, in your opinion as a pathologist, if the man was living and he suffered a great 'shock' or *freight*, would that have any effect on such a condition?

126 A. Yes, I think if the man suffered a shock or fright that could have contributed to his cause of death because of his existing anatomical heart condition.

Q. This case is going to be tried before folks who are not doctors and would you be kind enough, in as simple words as you can give it, to tell us how that comes about, what the mechanics is of causing an aggravation of such a condition by 'shock' or fright?

A. No, sir, I can't state that, and in my opinion no one else can. That mechanism is not known. It is known to be a nervous mechanism and it is undoubtedly mediated through a nerve called the vagus nerve; but the precise mechanism is not known so far as I know.

Q. Does 'shock' or fright have anything to do with constricting the blood vessels?

A. Yes, sir.

Q. And if you have a blood vessel already involved nearing the point of occlusion or blockage, will further constriction be likely to close and complete blockage?

A. It could, and I would have to answer that it likely would.

Q. I don't know much about the detail of this, but am I right in the thought that there is some control over the nerve constriction of the blood vessels under the adrenal glands?

A. Yes, sir, there is a hormonal supplementary control mechanism.

Q. And does 'shock' or fright have the effect of causing the adrenals to bring about action on the nerves and constriction of the blood vessels?

A. Yes, sir.

Q. From your examination of this man after death, did it appear that the collateral circulation in the region of the occlusion was carrying any of the blood beyond the normal?

A. Yes, I think it was, but we made no quantitative observations so I couldn't say how much.

Q. Would you explain so the jury will understand that, just what happens when the collateral circulation carries the blood around the point of occlusion?

A. Well, in the heart and in almost every other tissue as well, there are many small vessels that ordinarily are not used, or are used very little by the body. When one of the large vessels that ordinarily carries the major
127 blood supply is slowly occluded, these small vessels gradually increase in size and take over the function of the large vessel; so that by the time it becomes totally occluded, there is frequently enough additional blood supply developed that the loss of function of the large vessel is not felt by the body, or at least as far as the heart is concerned, death does not result. If such a large vessel is suddenly occluded, of course there isn't time for the growth and expansion of the collateral circulation and so severe incapacitation or death then follows.

Q. In your opinion, Doctor, from what you found of the coronary occlusion, had that been a gradual process?

A. Yes, sir.

Q. And along with that gradual process, the collateral circulation had developed to carry some of the blood that the main artery had previously carried, is that correct?

A. Yes, it had, though the degree of it I did not pay particular attention to.

Q. Now, with that process going on, would the man necessarily have met with death at any particular occasion?

A. No, one can't state in this case the precise time of death. As a matter of fact, you can rarely state that. It is only under unusual circumstances that you can say that this did at this instant cause death.

Q. And with that collateral circulation developing to carry the blood, would it have been possible that this man, living a normal life, might have gone on to his usual expectancy?

A. Your question included the word 'possible', and you have to say yes, it is possible.

Q. Now, would a shock or fright have the effect of constricting the blood vessels in the collateral circulation?

A. Yes, sir.

Q. And could that combination along with an already effected coronary occlusion be an aggravating factor to cause the immediate death?

A. Yes, it could. I think it is only fair to state that in the type of coronary disease that this man had, one isn't

surprised to find them fall dead at any time with or without provocation. Provocation can be such trivial inci-
128 dents as stooping to tie a shoe lace, or almost anything. They are subject to sudden death at any time.

"Q. But more likely so if confronted with a violent or terrible shock or fright?

"A. I would think so, yes.

"Q. That would have a more aggravating effect, would it not?

"A. It certainly should have.

"Q. Now, so far as you are concerned, Doctor, would it be consistent with any views you have on the subject that this man could have suffered such a shock on realizing that there was an impending collision, and before the collision occurred that the condition could have been aggravated to the point of death?

"A. Well, I believe he could. I don't know the circumstances preceding the wreck at all excepting what I read in the paper; so I really don't know, but I think he could, all right.

"Q. Now, in regard to the ability to detect Mr. McDonald's condition, say, in the year before the accident happened, would a medical examination relating to the heart have indicated to a medical practitioner anything wrong, in your opinion, in this case?

"A. There are some of this type of case in which the present diagnostic procedures for some reason or other do not reveal the condition. Usually it does, but not in all of them. And so far as this particular man is concerned, I couldn't state whether his could have been revealed, or were revealed. They might not have been, however.

"Q. Your association, Doctor, with the Thomas Dee Hospital as pathologist—that is the Thomas Dee Hospital at Ogden?

"A. Yes, sir. My association there is not as pathologist.

"Q. Pardon me. Is it an occasional autopsy?

"A. Yes, sir. I just go down to help them out off-duty hours or when I have time—evenings and Sundays.

"Q. In that connection do you do any work for the railroads, the Southern Pacific or the Union Pacific?

"A. No, sir; not that I know of.

"Q. The doctors down there, do you know if they have the Southern Pacific and Union Pacific patients there at the Thomas Dee Hospital?

"A. I have heard that they do, but I don't know 129 that of my own knowledge.

"Q. Do you know who the doctor is for the Southern Pacific down there?

"A. I think Dr. Morrell, but I am not sure.

"Q. And have you worked down there with Dr. Morrell on some of these autopsies?

"A. Yes, I have done an autopsy, or maybe two, for Dr. Morrell.

"Mr. Hildebrand: I think we can stipulate, can't we Counsel, that he is the doctor for Southern Pacific at Ogden?"

Mr. Ray: Mr. Howe didn't know about that. Mr. Black, I will state to you that he was for many years the doctor for Southern Pacific in Ogden. He has been ill for some time.

Mr. Black: Dr. Morrell is now?

Mr. Ray: Dr. Morrell was and is now.

"Q. Now, you say Mrs. McDonald through Dr. Thomson, or was it Dr. Bartlett, asked you to make the autopsy?

"A. It was through Dr. Thomson, as I understand. It might be Dr. Bartlett; however, I am not sure of that.

"Q. Who is Dr. Thomson? Was he a doctor for the McDonalds?

"A. No, Dr. Bartlett is McDonald's personal physician.

"Q. And who is Dr. Thomson?

"A. Dr. Thomson, as I understand it, was an assistant surgeon on the Southern Pacific Railway staff at that time.

"Q. I see. And was he the one who made the request for the autopsy so far as you were concerned?

"A. I think so. I am not clear in my own mind on that. January 1st was a busy day around here because we had all of the soldier personnel here and there were a number of telephone calls came in and my secretary took most of them. I talked to various doctors, but at this time I don't

remember who I talked to and I don't remember the precise circumstances.

"Q. In any event, Mrs. McDonald did not pay the expenses or your fee for the autopsy?

"A. No, sir.

"Q. That was paid by the Southern Pacific?

"A. Yes, sir. There was no discussion of fee at any time during the 1st of January.

"Q. But some time later you did receive a check
130 from the Southern Pacific for the autopsy?

"A. Yes, sir.

"Q. Doctor, as I understand it, your opinion is that this man died at some time before the steam struck his skin?

"A. Yes, sir; I believe that.

"Q. But whether it was a few seconds or a minute or how long before you can't say?

"A. No, sir; I can't say.

An autopsy report consisting of nine pages, Defendant's Exhibit A, received in evidence. The material portions of this report are as follows:

Name: McDonald, James, Engineer, Southern Pacific RR. Nativity: Ireland Age: 64 Sex: Male Race: White Died: 31 December 1945

Necropsy performed at 4L; 5 P.M., 1 January 1945 at Kirkendall-Darling Mortuary, Ogden, Utah, upon request of: Wendell J. Thomson, M.D., Surgeon for Southern Pacific Railroad. Witnesses: F. K. Bartlett, M.D., Family Physician present at the request of Mrs. James McDonald.

W. J. THOMSON, M.D.

Pathological Diagnoses.

Cardiovascular System:

1. Coronary arteriosclerosis, advanced, with hyaline occlusion of left descending coronary artery.
2. Atherosclerosis, generalized, moderately advanced.
3. Fibrosis of myocardium, left ventricle, apical region and adjacent septum.

4. Hypertrophy of myocardium, moderate (420 gms.).

Respiratory System:

1. Atelectasis and emphysema, mild.
2. Fibrosis of pleura, local, right apex.
3. Anthracosis, moderate.

* * * * *

Miscellaneous:

1. Desquamation of epidermis over
   a. Anterior and lateral thorax
   b. Arms
   c. Hands
   d. Anterior thighs
   e. Lower legs
2. Laceration, superficial, above outer canthus, left eye.
3. Abrasions, over forehead, face, side of left nostril, and right ankle.
4. Ecchymosis, moderate, periorbital.

Protocol.

131 General: The well-developed and well-nourished arterially embalmed body measures 138 cm. in length and is estimated to weigh 200 lbs. There is no edema, cyanosis nor jaundice.

External abnormalities are as follows:

Several brown discolorations in the skin of the forehead, bilateral, the largest over the left *eyebrown* measuring 2 cm. in diameter. Others vary from 2-3 cm. in diameter.

A laceration, 1.5 cm. in length and 2 mm. in depth in the left forehead 1.2 cm. above the outer canthus of the left eye. There is no hemorrhage about this.

Abrasion 1 cm. in diameter over lateral border of mid-portion of left nostril.

Numerous small abrasions over the face. There are no deep cuts.

Moderate ecchymoses of both upper and lower eyelids.

Marked discoloration and reddening of skin of neck.

Marked desquamation of skin of anterior and lateral thorax. The remaining dermis is bright pink and smooth. Shreds of epidermis adhere to various areas.

Similar desquamation of epidermis of arms, forearms and hands. No epidermis remains on the hands from the wrists downward. The nails are all present.

Desquamation of epidermis over anterior and medial surfaces of thighs, bilateral, about the knees and over ankles.

Subcutaneous hemorrhage over instep of left foot.

Abrasion over internal malleolus, left.

Abrasions over right ankle.

Compound fracture of left tibia, in the upper portion of the lower third.

Crepitation on pressure at ankle of right mandible.

* * * * *

Heart: 420 gms. The heart is slightly enlarged.
132 It is distorted somewhat in embalming. The posterior wall is flattened. Pericardial fat is moderately abundant. The chambers contain a large amount of semi-coagulated blood (result of embalming). The valve ousps are everywhere thin and delicate. Chordae tendineae are thread-like and the papillary muscles are sturdy. The valves measure in circumference as follows:

Tricuspid valve	12.0 cm.
Pulmonic valve	9.0 cm.
Mitral valve	11.0 cm.
Aortic valve	8.00 cm.

The musculature is flabby and yellow brown in color. The left ventricle measures 1.4 cm. in thickness; the right varies from 0.3 to 0.5 cm. The *endorcardial* surfaces are lusterless. The foramen ovale is closed.

There are two conspicuous gross abnormalities in the

heart: one related to the myocardium and the other to the coronary vessels. There is a moderate sacculation of the left ventricle toward the right in its apical third. The myocardium is diffusely scarred beneath this, over an area about 3 cm. in vertical extent and extending from the endocardium 4 or 5 mm. into the myocardium. The area containing the scars is approximately 3 cm. in width and extends into the septum at the apex of the heart.

The second conspicuous feature is the marked thickening of the major coronary artery wall: 0.4 cm. from its origin the right coronary is 5 mm. in diameter, although the lumen is but 1 mm. in diameter. Distally, the lumen varies in size and there are calcified plaques lying within the intima. The artery is moderately tortuous. Five cm. from its origin it is pipe-stem-like, 4 mm. in diameter, though the lumen here is 2 mm. in diameter. In general, the lumen of the right coronary approximates the thickness of the wall in its diameter. Nowhere is this artery totally occluded.

Left Coronary: 3 mm. from its origin, this vessel is approximately 4 mm. in outside diameter. The lumen is 1.5 mm. in diameter; the wall is excentrically thickened, and is as much as 2.5 mm. in thickness in this area as well as in several areas distal. The thickening manifested is irregular in distribution and in portions, is calcified. The de-
133 scending branch is pinpoint in diameter, 3 cm. below the bifurcation of the left coronary. Five mm. distal to this point the artery bifurcates and one branch is totally occluded with hyaline, calcium-containing material. The other is subtotally occluded. (These are the branches extending to the apex of the left ventricle.)

Aorta: There is marked atherosclerosis and some calcification throughout the entire extent of the aorta. Elasticity cannot be determined because of the embalming. The intima is everywhere intact. The atheromatous plaques in the thoracic aorta measures as much as 2 cm. in diameter. Those in the abdominal aorta are almost confluent. The descending thoracic aorta is 7 cm. in circumference. Below the renal arteries it is 5.5 cm. and at the bifurcation is 5 cm. The right renal artery measures 1 cm. in circumfer-

ence; the left renal, 1.2 cm. There are a few small atheroma in these, too; though there is no calcification.

* * * * *

The salient findings are the marked coronary atherosclerosis in both the right and left coronary arteries, and particularly in the left descending branch which is hyalinized and totally occluded in one area, and the marked hyaline fibrosis scattered throughout sections from the left ventricular wall. There is, in addition, considerable fragmentation of fibers. In addition, there is considerable hyaline fibrosis scattered throughout the musculature of the left ventricle, atrophy with fragmentation of myocardial fibers and pyknosis of nuclei. In all of the left ventricular sections, these changes are particularly marked.

Blocks 4, 6 and 7, all of the left ventricle, contain much scattered hyaline fibrous tissue between the muscle fibers. The fibers are shrunken.

The nuclei are pyknotic. Striations are indistinct. The small coronary arteries are thick-walled, so that their lumina are often no greater in diameter than the thickness of the wall itself. Some are subtotally occluded. Some of the fibers are markedly hypertrophied. Adjacent mitral valve is normal. Pericardial fat is normal. There is no cellular reaction in these blocks to indicate a recent infarcation, though there are a few scattered *lymphotytes* in the
134 vicinity of some of the hyaline fibrous areas. (The absence of leukocytes would not exclude a sudden recent infarct F.B.Q. of minutes or even perhaps hours duration.)

In blocks # 1, 5 and 7 from the right apex, left apex and septum, the changes mentioned above are inconspicuous. There is some increase in interfascicular connective tissue, and in one of the sections from the septum, there is moderate hyaline fibrosis. Muscle fibers are shrunken. The small vessels are frequently moderately thick-walled. There is some hyaline fibrosis about a few of them. However, in general, in these blocks the changes are not particularly marked.

Block # 1 of the right coronary artery, shows this artery

to be approximately two-thirds occluded by a hyaline plaque replacing the *itima* and media extending about two-thirds of the circumference of the artery. There are a few cholesterol clefts in this acellular hyaline material and an occasional cluster of lymphocytes. Otherwise the process appears entirely inactive and static. Adjacent fat is normal.

In block from near the origin of the left coronary artery, its lumen is found to be similarly reduced in size by about one-half, by a similar hyaline reaction. There is some calcium in the media of this artery. The media thinned-out considerably. Adjacent fat is normal. Adjacent myocardial fibers are markedly atrophic.

In block # 3, the left descending coronary artery is completely occluded with acellular hyaline material. Some calcium is present in this, also. The left circumflex is subtotally occluded; the remaining lumen being about one-third or one-quarter its original size. The intimal replacement is with relatively acellular hyaline material. Adjacent myocardial fibers are fragmented, small, and their nuclei are pyknotic. The left circumflex artery contains an area of calcification within the media. Its lumen is reduced to perhaps one-half the normal size (block # 2).

Four blocks of the descending branch of the left coronary, taken at various levels, reveals varying degrees of occlusion.
In some, the lumen is perhaps but one-fifth of its
135 original size. The intima is replaced with hyaline material containing calcium. In the myocardium adjacent to one of these blocks, there are many mononuclears and scattered plasma cells and red cells. This is the only block in which there is cellular reaction.

Aorta: (3 blocks, 6 sections) In two of the blocks from the aorta, there is extensive acellular debris within the intima and between the intima and the media. Some clefts indicative of cholesterol deposits lie in this amorphous material. The media is composed of fibrils among which there are scattered lymphocytes and mononuclears. The elastic connective tissue *fibres* of the media stain poorly. There are lymphocytes within the media, also. There is no perivascular infiltration such as characterizes syphilis. In one

of the blocks there are a few granules of calcium within the amorphous debris.

* * * * *

Skin through Burned Area: Anterior Chest: (1 block, 2 sections) The epithelium is desquamated. The corium is collagenous and uniform in appearance. The underlying fat of the subcutaneous tissue is architecturally normal. The lack of *neclei* and cell detail in the corium is characteristic of cooked tissue (heat effect). There is no cellular reaction about the blood vessels nor within the tissue. Small veins are filled with poorly preserved red cells. Cytological detail throughout the entire section is very poor. The nuclei of white cells within the vessels are clearly recognized, however.

* * * * *

Discussion.

The significant findings in the postmortem examination of the body of this 64-year-old railroad engineer are:

1. Advanced coronary arteriosclerosis, with total occlusion of one branch of the left descending coronary artery.
2. Fibrosis of the myocardium in the apical region of the left ventricle and adjacent septum.
3. Absence of cellular reaction in the skin in area of most marked desquamation.

The heart changes found are those commonly found in cases of sudden death, and are adequate to cause such death.

From these findings *along* one cannot state the precise
136 time of death.

The external injuries sustained (burns, fracture of left lower leg and right mandible, and abrasions about face) are not sufficient to produce immediate death of themselves.

The absence of cellular reaction in the skin of the most severely burned area (desquamating region of chest) is evidence that this man was not alive at the time of this injury, and the absence of red cells and serum in the lung

alveoli is strong presumptive additional evidence that death did not result from external injuries or "shock".

It is concluded, therefore, that death resulted from heart failure before the cutaneous burns were sustained.

Other findings are of incidental or secondary nature.

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137 ORIN A. OGILVIE, a witness for defendant, testified:

Direct Examination (By Mr. Ray).

I reside in Salt Lake City and have read the report of the autopsy performed on the body of James McDonald. I am by profession a pathologist; I have lived in Salt Lake since 1914. I graduated from the University of Utah, took a Master's Degree in pathology and bacteriology. Then I went to the University of Chicago and took courses in pathology. Then I went to the University of Pennsylvania and got my M.D. Then I took special training in pathology at the Philadelphia General Hospital and under various pathologists. I interned at the St. Marks Hospital in Salt Lake and became associated with the Department of Pathology at the University of Utah, where I became head of the department. I have been a pathologist for a number of small hospitals throughout this region. I run the Wasatch Laboratories and am also pathologist for St. Marks Hospital and Holy Cross Hospital at Salt Lake City. I have been professor of pathology at the University of Utah Medical School.

Q. Now, if you will tell his Honor and the jury what the field of pathology covers.

A. One of the most important fields—of course there are two branches: One is pathological anatomy and one is clinical pathology. I am qualified by the American Board of Pathology in both lines. The clinical pathology includes such determinations as blood chemistry, hematology, serology, parasitology, bacteriology, and so forth.

Pathological anatomy includes gross and microscopic tissue diagnosis, surgical and post mortem. So that in that we take specimens from the operating room, make a gross description, make microscopic examinations and interpretations; and at the autopsy, of course, we do a complete

examination of the body and do histological or microscopic examinations of all the tissues and interpret them.

I have performed about 3000 autopsies. Autopsies are performed to ascertain as nearly as possible the accurate reason for death. I am familiar with the usual autopsy reports and their terms and meanings. The autopsy report,
Exhibit A, is a report showing a complete examina-
138 tion of the body, it is a thorough examination.

Hearts are one of the commonest causes of death. In fact, cardiac-vascular disease is the most common cause of death. Mention is made of coronary occlusion. There are two coronaries in the heart. They come off the aorta, which is the main blood vessel that comes out of the heart. They come off right after the origin of the aorta. One is called the right coronary and the other is called the left coronary. Those two vessels supply practically all the blood to the heart muscle. The heart muscle to function must have a supply of blood. When the blood supply is cut off, the muscle immediately suffers an acute anoxia; in other words, no more oxygen to the muscle, no more waste products carried away, and no food. Therefore, it begins to die immediately. If the occlusion is complete, then the muscle begins to die. One of the most common causes of death is coronary occlusion. It not infrequently happens that an individual who has coronary arteriosclerosis will develop an occlusion if he suddenly exerts himself or over-exerts himself or over-eats, gets excited, or anything which will tend to raise the blood pressure may provoke an occlusion. That is very common. On the other hand, another individual may suffer an occlusion while he is asleep and never wake up. That is not uncommon, that occurs all the time.

Q. —page 27 of Dr. Queen's autopsy report, about
139 two-thirds of the way down, the paragraph reads this way: "There are two conspicuous gross abnormalities in the heart:"—you see that paragraph?

A. Yes, sir.

Q. Would you read that and then tell us what it means in English that is a little bit easier to embrace?

A. "There are two conspicuous gross abnormalities in the heart: one related to the myocardium and the other to

the coronary vessels. There is a moderate sacculation of the left ventricle toward the right in its apical-third."

That means that the apex or the distal portion of the left ventricular chamber, which is the main chamber in the heart, the one that pushes the blood when it contracts—throws the blood out through the aorta all *though* the body. That sacculation means there was a little out-pouching of the apex of that ventricle or that chamber. Instead of coming down to an apex just like that (indicating) it came down like that, and this made a little—

Q. A sac in it?

A. —sac. That is right.

"The myocardium is diffusely scarred beneath this, over an area about 3 cm. in vertical extent and extending from the endocardium 4 or 5 mm. into the myocardium."

In other words, there was a marked scarring of the wall in this vicinity and scar tissue is never as strong as the muscle so that is why it sacculated. And he says that this is 3 cm. long—that is, 2.54 centimeter is one inch—so it would be about that long (indicating) coming from the apex upward.

And then it ran from the endocardium, which is the lining of the heart, to "4 or 5 mm. into the myocardium." In other words, it didn't extend completely through the wall but it went perhaps half way through it.

Q. Now, will you take a look at the paragraph at the bottom of page 27 which refers to the left coronary and read that and then tell us what that means?

A. "Left Coronary: 3 mm. from its origin, this vessel is approximately 4 mm. in outside diameter. The lumen is
1.5 mm. in diameter; the wall is excentrically thick-
140 ened, and is as much as 2.5 mm. in thickness in this
area as well as in several areas distal. The thickening manifested is irregular in distribution and in portions, is calcified."

Now, that is the main vessel. In other words, 3 mm.—that's about that much (indicating)—3 mm. from the point of origin of this main left coronary vessel there was evidence of arteriosclerotic disease.

Q. What is that?

A. Well, arteriosclerosis or atherosclerosis is a degenerative disease which occurs in the vessels of people as they

become older. Now, some people have much more sclerosis than others, depending upon their hereditary and upon their vocation and so forth. In other words, hereditary plays a part. You are hereditarily predisposed to or you are not to sclerosis.

That is, if you are a doctor or a lawyer or something, your profession will lead you into more stress and strain that is conducive to sclerosis; whereas if you are a housewife and take it easy or a laborer (laughter)—of course, that may not be strictly true during the war days, in these days of rationing, but at least there is not the mental stress and strain that there is to presenting a case before the jury or diagnosing medical cases or degree of responsibility. That is what I mean—mental stress and strain.

Then infections and various other changes, wear and tear have something to do with it.

Well, when this degenerative process begins, it begins in the inner portion of the wall, in the so-called intima. It is a degeneration so that there is a weakening. Then there is a muscular fibrosis. That means youthful connective tissue tends to strengthen the wall.

There is a fatty degeneration and that weakens it some more and then there is a vicious cycle—some more fatty degeneration, and when you get too much fatty change, then there is a liberation of fatty acids, along comes the calcium from the blood and that deposits lime in there.

An atherosclerotic or arteriosclerotic vessel which
141 is very sclerotic is always like an eggshell. You can crush it like that (indicating) and it will crack like an eggshell. That kind of vessel is very inelastic and along with this inelasticity there is a narrowing of the lumen that carries the blood.

Q. That lumen means the inside bore, does it?

A. That is right. The lumen is the bore that carries the blood.

Now, he said this was excentric; in other words, it was not uniform in the wall but this degenerative process and calcification was thicker—the process was thicker in one portion than in another, so it made it sort of a nodular effect on the external portion. The lumen 1.5 mm. for a left coronary is very small, very small.

Q. Are we to understand by that, then, that this vessel

had gotten to be a very small vessel for the job it was supposed to do?

A. That is right. And if that man had tried to have done severe exercise he couldn't have done it. In other words, if he had tried to rush up the stairs or box a little or wrestle, something like that, he wouldn't get the blood supply. It would be imposible for him to do it, although he might live a sedentary life, he might sit in his box and be able to apply a brake, and get along fine.

Now, "The descending branch"—now, the descending branch, that is the anterior descending branch—"is pinpoint in diameter, 3 cm. below the bifurcation of the left coronary. Five mm. distal to this point the artery bifurcates and one branch is totally occluded with hyaline, calcium-containing material. The other is subtotally occluded. (These are the branches extending to the apex of the left ventricle.)"

In other words, as the aorta comes out from behind, the left coronary is posterior, it comes out and divides into two main branches. One comes around to the left. It is called the circumflex branch. The other goes straight downwards. It would be located in me about there (indicating), right in front of the heart. It goes down as the anterior descending branch.

Now, he says that branch, the lumen is very much
142 smaller than it should be, it is pinpoint. Then as it gets down farther toward the apex, one branch is absolutely occluded, completely occluded, so no more blood gets to the apex of the heart from that vessel. The other one is very much narrowed.

Now, that occlusion has occurred months or years before.

Q. That one?

A. That occlusion, that is right, because it is calcified and it is hyalinized and that takes a long time. That is the reason why the apex of the heart and the proximal septum was so fibrosed and pouched out.

Q. What does he refer to in Exhibit A on page 27, if anything, which gives the cause of this man's death or which you might construe as the cause?

A. On page 27?

Q. Is there anything on 27 which would—

A. I don't see it listed here under that heading.

Q. Will you refer then to page 33?

A. Okay.

Q. "The significant findings in the postmortem examination of the body of this 64-year-old railroad engineer are:

"1. Advanced coronary arteriosclerosis, with total occlusion of one branch of the left descending coronary artery." Now, what about that as a cause of death?

A. The advanced arteriosclerosis, I take it, could be the cause of death, but this occlusion of the one branch of the left descending branch was not what killed him.

Q. "Fibrosis of the myocardium in the apical region of the left ventricle and adjacent septum." What about that?

A. That is consecutive to the occlusion of the distal branch of the anterior left descending vessel and that has occurred a long time ago, too.

Q. Now, you have read the description of this examination, have you not, in full detail?

A. Yes, sir.

Q. Do you have an opinion as to what caused the death?

A. Yes.

Q. Would you give it please?

143 A. I think he died from advanced coronary arteriosclerosis with either a terminal occlusion of a minute vessel which supplies the conduction bundle, that which conducts the impulse from the auricles to the ventricles, the auricular-ventricular bundle. You may have a small occlusion of that branch you can't see grossly. It would supply the blood to that particular bundle. If the conduction mechanism is upset suddenly, they may die and you can't see it grossly. But with a heart that shows as much advanced arteriosclerosis as this one, you can expect such things.

The other possibility is that he suffered an acute spasm of one or more other vessels which led to exemia so-called, and decreased the blood supply sufficiently to this heart so that it led to death.

Q. Now, what causes those spasms?

A. Well, they are sort of like the occlusion which is when a blood clot hits it. Of course, you may get an occlusion in more than one way. Infection may occlude a vessel, syphilitic or pyogenic infection. Or you may have an endo-

carditis, inflammation of the heart valve, and inflammation sneaks over through the muscle along the aorta and occludes the orifice. That is quite uncommon.

Another uncommon type is for an ambolus to hit the vessel, to clog it or occlude it. If a person has a clot in the apex of his heart or the auricular appendage of the heart or in the valve of his heart, they break off and away they go. They call them emboli. Once in a great while one of those fragments will lodge in a coronary and cause an occlusion. It is rare.

By far the most common cause of occlusion is atherosclerosis. The vessel becomes narrower and narrower and for some reason or other unknown to anybody, a clot will form at that spot. One clot then will propagate and will grow bigger and bigger until finally it completely occludes the vessel so no more blood gets beyond that point.

Q. And that is promoted by the diseased condition which reduces the inside capacity of the artery?

A. That is right.

Q. Now, is it your opinion that the condition of
144 the heart as he described it here brought on his death?

A. Yes, that is right.

Q. Now, we have heard a good deal of a word here during the testimony of Dr. Queen, "desquamation"; what is that?

A. That is sloughing off. In other words, if you see how a chicken molts or a snake loses its skin, that is desquamation.

Q. And that is what he meant in connection with the burned areas on the chest and face of Mr. McDonald?

A. Yes, that is right.

Q. Now, did you read and study the autopsy report as it relates to the burning of the skin?

A. Yes.

Q. I call your attention to the third from the last paragraph on page 33 where he says:

"The absence of cellular reaction in the skin of the most severely burned areas (desquamating region of chest) is evidence that this man was not alive at the time of this injury, and the absence of red cells and serum in the lung

alveoli is strong presumptive additional evidence that death did not result from external injuries or 'shock'." Now, tell us first what that means, the absence of cellular reaction in the skin.

A. Whenever you injure the skin as from heat or from sunshine or any kind of radiation it causes a reaction. The skin becomes red first. That is the first thing you see. And that redness is due to an increased blood supply. The heat acts upon the capillary walls and causes them to relax and an increased blood supply is brought to the part. This is Nature's method of repairing the damage. So an increased blood supply is brought to the part and that causes a redness.

The next thing, if it is more severe, there will be a transudation of fluid or a passage of fluid components from the blood out through the capillary walls into the tissue and the best example of that is a blister. You have seen burns, second degree burns, where you get blisters. That is nothing more nor less than the passage of this blood serum out through the capillary walls into the tissues and it lifts
145 the superficial portion up. That is transudation of fluid. That is part of the cellular reaction.

The next thing or part of the vascular reaction—you get vascular and cellular—the next thing you see is the exudation of cells. Now, if the damage is severe enough, there are chemical changes occur in the tissues around the capillary cells in the capillary walls, and these are called positively chemotactic, and they call forth leukocytes or white blood corpuscles. They pour right through. They go right through the vessel whether they are injured or not. But in these injured vessels, they simply have wormed their way through. They are what they call ameboid. They can wiggle their way through the walls of the vessels and they will accumulate out in injured tissue.

That is the cellular reaction, and it goes on until these leukocytes pick up the dead and the dying tissue and then they go back to the blood vesesls and take them to the lymph nodes or destroy the material or digest it. So that is Nature's method of repairing the damage.

The fixed tissue cells is the next thing which happens. You have connective tissue cells that are found in all kinds of tissue. They hold all other things together. In other words, they hold the blood vesels in place. They hold the cells together, and you find connective tissue every place, every organ, and every tissue? These tissue cells will proliferate or increase in number and they will fill in gaps that are destroyed. Just like when you get an ulcer on your hand or anywhere else, they grow in in all directions. Capillaries grow in from the capillaries in the vicinity and they repair the defect. And after a while, if it isn't too much of a destruction, you will have a reparation. Epithelium will grow over the surface, that is, the cells that cover the skin will grow in from all sides and from many islets that will be left and you will have a complete repair or regengration of the tissue unless the defect is too great.

Q. When the burn or steaming is sufficient to result in a sloughing of skin, is the damage sufficient to summon at once those agents of repair which Nature provides?

A. Absolutely, if the circulation is intact at the
146 time of the injury. In other words, if the blood is still circulating and the individual alive, let us say, and the blood circulating in the part which is injured, there will be all of these various mechanisms taking place and it occurs immediately.

Q. Immediately?

A. That is right.

Q. Now, what conclusion do you reach, then, when you find extensive burning on the chest and none of this activity you have described?

A. We would have to assume that the circulation was absent, that the blood was not circulating through those tissues as it should be at the time the burn took place.

Q. And in the absence of such circulation, what would be the condition of the body?

A. It would be dead.

Q. Now, blood is circulated through the entire body largely if not entirely by the activity of the heart, is it?

A. Yes, sir.

Q. What is peripheral circulation?

A. That means circulation out in the extremities, in the skin.

Q. Now, is the peripheral circulation controlled by the heart action?

A. Certainly.

Q. And when the heart ceases to function, even that peripheral circulation stops, does it?

A. It stops immediately. The circulation will stop. The only thing that happens after the heart ceases functioning or the heart stops is that the musculature, an elastic tissue in the arteries, will contract and push the blood on into the venous system, which carries the blood back to the heart. That is why they are called arteries, the ancients thought they were full of air.

Q. Is there any appreciable lapse of time between the fatal heart attack and the termination of circulation?

A. Simultaneous.

Q. So that when the heart stops functioning the circulation stops?

A. That is right.

147 Q. And the skin is dead at that point?

A. Well, it's dead so far as any response is concerned. You *make* take a piece of skin off and graft it on something else and it would take.

Q. What about these alveoli in the lungs?

A. Well, the alveoli in the lungs are the air sacs of the lungs. When you breathe, when you take in a breath of air, down goes your diaphragm and up goes your thoracic cage and in rushes the air into the alveoli, that is, through the larynx, the trachea, the bronchial tree, and going into the alveoli.

Now, these alveoli are the air sacs around which the circulation like capillary circulation—is like that (indicating) around the alveolus, and it is through the alveoli the air comes in. Then there is an exchange. The carbon dioxide is given off to the air and oxygen is taken in by the red corpuscles, you see, and then carried back to the rest of the body. That is the mechanism of getting rid of the carbon monoxide or most of it and the mechanism of getting oxygen back into the blood.

* * * * * *

Q. Dr. Ogilvie, if I understand you, this heart condition had progressed to the point where the stage was set for sudden death no matter where this victim might be?

A. That is right.

Q. Now, when the final onset comes, plugging of the artery or the sudden stopping of the circulation in the heart, is that accompanied by pain or likely to be?

A. It depends on the individual. Some people are very sensitive to pain and others are more phlegmatic. The average individual, however, does have exquisite pain if it is a large vessel, but once in a while an individual will not get any pain at all.

Q. When you say ordinarily it is accompanied by exquisite pain I take it it is a very lovely pain?

A. Well, it is severe.

Q. Devastating?

A. That is right. They feel like they are going to die.

Q. Does that influence the capacity to function physically, that pain?

A. Yes.

148 Q. Now, I take it, Dr. Ogilvie, that depending upon the violence of that onset, the patient may die suddenly or within seconds or minutes or whatever the case may be depending on the particular case?

A. That is right. He may die right now or he may live for a matter of seconds, minutes, or even a week or so.

Q. Now, you have described that as having the mechanical effect of stopping the supply of blood to the heart, is that right?

A. That is right, to the given portion of the heart that that particular vessel supplies.

Q. Now, the stopping or slowing down of the heart action there, does that have any effect on the brain, especially if the victim is upright, standing or sitting?

A. Well, he wouldn't necessarily have the heart rate affected. It just depends on how extensive it is. Sometimes the heart rate will be increased rather than decreased, but—whether or not the circulation is altered in an adverse fashion—so if it is a severe attack, he does get a cerebral anemia.

Q. That means an absence of blood in the brain?

A. I wouldn't say a total absence, but it is cut down to a point where he may have a total absence eventually.

Q. So a severe attack, one severe enough to be fatal, I

take it has the effect of reducing the blood supply in the brain?

A. Definitely.

Q. And the reduction of the blood supply in the brain, does that have any effect upon the consciousness of the victim?

A. Yes, sir.

Q. Let me present for your assumption a fact or two, if you please, Doctor: Let's assume that the man upon whom the autopsy was performed as reflected in Exhibit A was an engineer of long experience subject to certain rules, one of the rules being that he should stop his train upon the displaying of a red signal; another that he should respond to the fireman when the fireman calls a red signal. Let's assume that this train was moving 50 to 60 miles an hour when it came to a red signal and then the fireman in a very loud voice called that the signal was red, that the engineer made no response by voice or in any other manner
149 discernible to the fireman who was in the cab with him, that the collision occurred in half a minute or less after that; and make the further assumption that the engineer presented physical conditions after the collision which you have seen described in Exhibit A, death from heart attack, burned skin in the condition you have seen it, the lungs in the condition you have seen them; would you have an opinion as to whether death had occurred or disability had occurred at the time the engineer failed to respond to that signal?

Mr. Roberts: Just a minute. We object to this as calling for a conclusion of this witness that isn't proper for him to make. That is one of the very things to be determined here, your Honor. Of course it is based on hearsay for one thing, but the main proposition, your Honor, is taking into consideration all these other matters which don't have anything to do with medicine.

Mr. Ray: This witness is qualified, your Honor, with respect to the power and incidence of this disease in this man's heart.

Mr. Roberts: You are asking whether or not he was dead at that time and that is based on whether or not he

makes a response. Certainly that is going too far with medical testimony, whether I will make a response when somebody asks me a question.

Mr. Ray: If it hadn't been established that the man was dead of heart failure, I think there would be merit in what Mr. Roberts says, but the witness having established that the man was dead of heart failure at the time of this collision and his conduct a half minute or a minute earlier than that, I am asking if he has an opinion based upon the conduct of this man half a minute or a minute earlier what his physical condition was at that time.

The Court: Well, if he thinks he has an opinion and that that data is sufficient for him to base an opinion upon, I believe I will let him answer it. Find out whether or not he has an opinion, if it is based upon the data that you have given, or whether he needs more data or less, or what not.

By Mr. Ray:

Q. Have you had sufficient to form an opinion, Doctor?
A. I think so. It would be my impression—

Mr. Roberts: Now, just a minute. The next question—I thought this was to be answered he has one. The next question I also desire to object to.

Mr. Ray: You better let me ask it first—that is right, he was going to answer it.

(By Mr. Ray.)

Q. Will you give that opinion, Doctor?
A. Yes, sir.

Mr. Roberts: Now, we object to that as being immaterial, irrelevant and incompetent, your Honor, asking for a conclusion which is not a conclusion which a medical witness can draw. It is based upon a proposition of whether or not somebody would respond or not.

The Court: If you want to cross examine him in advance whether or not his medical training is insufficient for him to answer, I will let you do that now. Of course, after he answers you would be entitled to cross examine him upon the basis of his opinion, but I will let you cross examine him in advance if you want to.

Mr. Roberts: No, if your Honor please, I think we have stated the grounds of our objection and I don't know how —in other words, the grounds of our objection is that this is going into a proposition which is the very function of the jury here, and it goes beyond what this man is qualified up to now to testify to.

The Court: Yes, but all of these questions which he answered are questions which the jury are not bound by. They can have their own opinion. I think if he has sufficient data here as a medical man to express an opinion based upon his training as a medical man, I will let him answer and then you can find out what his basis is. Objection will be overruled.

A. Well, I believe that and it is my impression from what I know of the case and in all respects—

Mr. Black: Just a minute, your Honor. What he knows about this case in view of this question is absolutely immaterial. The question is based on a statement of facts as related by Mr. Ray.

The Court: Yes, just as he has related them, and if that is insufficient, you can say so.

A. I will answer it by saying this: On the basis of what Mr. Ray had said, that it is my impression the man would have responded normally had he been mentally competent at the time the red signal was seen.

(By Mr. Ray.)

151 Q. Now, do you in the medical profession resort in diagnosis to the history of your patient?

A. Definitely.

Q. And you relate your conclusions to the conduct of your patients as to whether they relate to what you regard as normal or abnormal?

A. Yes, sir.

Q. Doctor, do you remember a part of the Exhibit A refers to the tibia?

A. Yes, sir.

Q. A compound fracture of the tibia?

A. Yes, sir.

Q. What is a compound fracture?

A. That means a fracture which is severe enough to force one or both of the fragments through the skin—

Q. That is, when the—

A. —the bone fragments.

Q. —bone *brakes* and one or the other parts jabs through the skin—

A. That is right.

Q. You have a compound fracture?

A. That is right.

Q. Is a compound fracture likely to be accompanied by bleeding?

A. If the circulation is intact it will be.

Q. If the circulation is not intact, it won't be?

A. That is right.

Q. When the fatal attack comes to a heart diseased as this one was, is there any way of determining just by looking at the heart itself whether the attack was followed immediately by death or whether there was an interval of time?

A. You can't tell within a few seconds or anything, but if there is a matter of hours or days elapses between the fatal attack and the instant of the onset, then you can tell because there are tissue changes that are recognizable.

Q. Now, if hours or days follow the attack before
152 the death, that would mean some blood was getting past the plug, wouldn't it?

A. That is right—well, not necessarily that. It might be there would be established a collateral circulation.

Q. Anyway, there would be some blood getting into the heart?

A. There would be some blood getting around into the area that was occluded.

Q. And if this occlusion or plug is complete, then death is substantially instantaneous?

A. If it is a major vessel.

Q. Before the lunch hour you said something about the ability or capacity of the muscles to create some circulation, venous circulation, did you say?

A. I don't remember just what it was.

Q. Is there any circulation voluntary or involuntary following death by this heart condition?

A. Well, there is the contraction of the arteriole and arterial walls, the small and large arteries contract as they die, as the tissues die, and they force most of the blood into the veins.

Q. How long does that continue?

A. Oh, that's just a short time. It is a matter of minutes.

Cross Examination (By Mr. Black).

Q. Now, Doctor, in stating your opinion on this hypothetical question addressed to you by Mr. Ray, did you have in mind any other facts except those that were stated to you by him?

A. No, none except what he told me about the case and what I have heard here.

Q. Now, you haven't formed any opinion as to whether or not the death of Mr. McDonald occurred one, two, three, four or five or ten seconds before the fatal collision or some prior time, have you?

A. Yes, I think I have.

Q. You think you have formed some opinion on that?

A. Yes, sir.

Q. Let me ask you if this would change your opin-
153 ion: Supposing that you knew as a matter of fact that after this train had passed a point 2458 feet to the east of the point of collision, traveling at the rate of 60 miles an hour, that after it had passed that point, this man who was found dead applied the air in the engine—

Mr. Ray: Just a minute, if the Court please, so my record will be straight. I object to that question as assuming something not in evidence.

Mr. Black: There is evidence to that effect. Now, Your Honor—

Mr. Ray: Just a minute. Let me make my record clear here. Witnesses testified they felt an application of the brakes. Mr. Black put three witnesses on—

Mr. Black: Four.

Mr. Ray: —four witnesses on that case. Three of them on cross examination admitted they didn't know whether the engineer did it or whether the impact did it. They are very

frank about that. He made no objection. The fourth witness said he felt the brakes, looked out the window and saw a flare. He couldn't see that flare until his engine had started telescoping these cars in front of him. Now, there is no evidence of any substance in this case that the engineer put on any brakes—

Mr. Black: Now, Your Honor, in view of the argument—

Mr. Ray: Just a minute. Mr. Black put on Mr. Hardman who sat by the engineer and he said positively he didn't put the brakes on.

Mr. Black: He said he didn't see and wasn't conscious of him putting any on but he couldn't even see well enough in the cab to recognize who the man in the cab with him was if he hadn't known him.

Now, Your Honor, this is the testimony which we claim now makes this testimony proper, that is, the fact that there is evidence here that the air was applied prior to the impact and the jury could so find. The evidence of these four witnesses mentioned by Mr. Ray together with the testimony of Mr. Welsh, together with the testimony of the engineers who were here, they know there is no way on earth to apply these brakes into service application except by the intervention of a human being.

154 Now, if that is true the jury could find from that evidence that that air was actually applied by McDonald and that being true I am entitled to ask this question.

The Court: Are you assuming that he didn't die immediately after the accident?

Mr. Black: No. I want to know—Dr. Ogilvie has testified now he has an opinion that the man was either dead or unconscious at the time that block was passed. I want to know if these facts, if they are facts, will change his opinion.

The Court: You can make that assumption that he applied the brakes and then you can get your answer.

By Mr. Black:

Q. Now, Dr. Ogilvie, if it appeared in connection with the other facts which you have stated that 11, 12, or 13 seconds—

The Court: Don't put it on that basis.

Mr. Black: All right, Your Honor. I will go back to the other.

Q. If it appeared now, Doctor Ogilvie, after the train had passed this block at the rate of about 60 miles an hour, this man who subsequently was found dead applied the air either in service or in emergency, would that change your mind as to whether he was dead or unconscious at the time he passed the block?

A. Surely.

Q. And you would have to conclude that he was alive at that time, wouldn't you?

A. That is right.

Q. And you would have to conclude that this coronary occlusion and heart failure took place after that?

A. That is right.

Q. Now, as a matter of fact, you can't tell either from your experience or training or from a study of this autopsy report exactly when McDonald died, can you?

A. Not absolutely, no, not down to the fraction.

Q. And you can't tell how long it required for death to ensue after the attack began, can you?

A. No, you can't be sure of that.

Q. You can't tell how long it was before the circulation stopped, can you?

A. Yes, if you know when he dies you can tell when
155 circulation stops.

Q. And the circulation would stop at the instant of death, isn't that true?

A. The minute his heart stops.

Q. You mean right now, don't you?

A. The second or the fraction of a second his heart stops, the circulation stops and he is dead.

Q. When that last heart beat has taken place the circulation stops?

A. That is right.

Q. And then at any time after that if the body was subjected to steam heat or the skin was punctured you would expect to find the exact results that were found in this examination by Dr. Queen?

A. Yes, if he is dead that is right.

Q. In other words, the only thing that would be necessary would be that death took place before the application of heat or the steam or that the skin was punctured?

A. That is right.

Q. Now, Doctor, I want you to explain to the jury again just the mechanism of this coronary occlusion that would result and cause death.

A. In this particular man?

Q. Or any similar case.

A. Well, I am not maintaining that he died from coronary occlusion.

Q. Well, that brought about the heart failure, didn't it?

A. No, not necessarily. He had an old coronary occlusion but he didn't have a recent coronary occlusion.

Q. Do you disagree then with Dr. Queen's conclusions?

A. Yes, sir.

Q. Then where Dr. Queen states that "It is concluded, therefore, that death resulted from heart failure before the cutaneous burns were sustained," you don't—

A. No, I agree with that. I think that he died from heart failure all right.

Q. What do you believe caused the heart failure?

156 A. I think he died from a coronary disease but not from occlusion.

Q. What particular coronary disease did he die from?

A. In all probability one of two things that I explained when I entered on this testimony. He could either have had one of two things as I see it. He could have had a small occlusion which you can't recognize grossly and which would take serial sections to detect microscopically. If it were in the right vessel which would supply the blood to the so-called conduction bundle which transmits the impulse from the auricles to the ventricles—if it were in the right place, even though it were a minor vessel that were occluded, it could interfere with that conduction and that

could cause a heart block and they could die right then and there from a heart plug.

The other possibility is an individual, and we know this is true, the individuals that have a grade of coronary sclerosis that this man exhibited, die suddenly and you can't find any occlusion in some of them.

Now, this man had an old occlusion that occurred months or years before but that didn't cause his death. Therefore, these vessels, if you cast out the other possibility or probability must have gone into spasm sufficiently great to cut down the blood supply to the heart to such an extent that it would not function any more.

Q. And what would be the likely cause of some of those heart spasms you have spoken of?

A. Oh, excitement, over-eating, exertion, things like that. Sometimes they come without anything.

Q. Supposing, Doctor, that an individual had suffered from this heart ailment, this coronary disease for a long period of time and at that time was suffering from arteriosclerosis to the extent revealed by this autopsy report—

A. Yes, sir.

Q. —and in the course of his employment he is riding and operating an engine at night in the fog at the rate of 60 or 65 miles an hour, and suddenly there looms up ahead of him the markers of another standing train and a flare indicating the presence of a standing train; would that terrific shock and fright have anything to do with the heart condition, would it excite it or aggravate it?

A. It would tend to make it worse rather than
157 better, that is a certainty.

Q. It wouldn't do him any good?

A. No.

Q. It would be a sufficient cause added to the pre-existing disease to cause instant death, wouldn't it?

A. There is a possibility of that.

Q. There is more than a possibility, isn't there, Doctor?

A. Well, I personally don't believe that fright kills people very often. It does occasionally but not very often, and I think the mechanism is not simply shock but rather a re-

flex mechanism which causes the heart to stand still. It is a cardiac arrest.

Q. Well, if a man died under those circumstances it would be rather difficult for a doctor to say whether he was scared to death or not, wouldn't it?

A. Yes, you couldn't prove he did and you couldn't prove he didn't.

Q. And if anybody said he was scared to death you wouldn't be in a very strong position to argue against it, would you?

Mr. Ray: What do you mean, "anybody"?

Q. Suffering from such a disease as McDonald was.

A. Well, one with a disease like he had could die at any minute at any time day or night without any provocation whatsoever. So therefore I could say he might have died without seeing anything. We see it all the time. We read about people dying in bed and they die during the night.

And there is this thing about his sudden death, the older the individual, the more coronary sclerosis they have and the longer the process has gone on, the more likely they are to have collateral circulation established. In other words other vessels take over the work because you have two coronaries, you know, and they don't die from coronary occlusion or a spasm as often or suddenly as the younger individual who gets a similar condition.

Q. Nevertheless, sudden fright or sudden fear or sudden excitement could bring about a situation where death would result from the heart disease?

A. Oh, yes, I think you would have to admit that
158 is a contributing factor; it might be.

Q. Would any heart specialist that you know of in attempting to answer the question as to what caused death overlook as one of the causes in a situation of this kind this sudden shock and fear that I have spoken of?

A. Oh, no. I think they would have to be considered. They consider everything.

Q. And do you know any doctor that wouldn't say and base an opinion that that could have had the effect of setting in motion the event that finally produced death?

A. Oh, I think everybody would have to say it could but I don't think they would say it did.

Q. But they would say it likely would have that effect, would they not?

A. No, I think they would say it might.

Q. Now, Doctor, you don't claim to be a heart specialist, I take it?

A. No, sir.

Q. Your work is confined to your specialty in the line of pathology?

A. That is right.

Q. I don't suppose that you have ever made any particular study of the effect of shock and paralyzing fear upon the heart reaction of someone suffering from heart disease such as Mr. McDonald had immediately before his death?

A. No, I have never made any special study of it. Just like other doctors I read about them. I read about it last night in Paul White's "Diseases of the Heart."

Q. Were you preparing for today ahead?

A. That is right.

Q. Well, now Doctor, does shock or fright have anything to do with the constricting of the blood vessels?

A. Yes, it may.

Q. And that really is what a coronary occlusion is,
159 isn't it, a restriction of the blood vessles shutting off the supply to the heart muscle?

A. No, a coronary occlusion is an occlusion, in other words, that is an obliteration of the lumen of a vessel.

Q. And that shuts off the blood supply—

A. That is right.

Q. —to the heart?

A. That is not the same as a spasm, however.

Q. All right. I am talking about constriction of the blood vessels by fright and fright is recognized as a cause of constriction of blood vessels, isn't it?

A. Yes, it may be. It also may do the reverse. It will dilate them; they will faint.

Q. But if a person suffering from such a heart disease was suddenly confronted by a terrible fright and died, you might assume those blood vessels were constricted, might you not, as a result of that fright?

A. It depends on what you find at the post.

Q. Well, was anything found at the post that was inconsistent with this view I am expressing?

A. No.

Q. And if you have a blood vessel already involved nearing the point of occlusion or blockage, will further constriction be likely to cause and complete the blocking?

A. It may.

Q. And it likely would?

A. Well, not at that point it won't because these arteries that are as nearly occluded as some in this vessel or this man's heart, they can't undergo spasm because there is too much lime and degenerative material in the walls. They can't undergo spasm but vessels near by or other vessels may.

Q. What factors control and affect and influence the action of the nerves that control the heart muscle and the blood vessels?

A. Well, the mental state of mind, whether the individual is calm or excited, diseases of the brain, diseases of the nerves themselves, diseases in the heart itself and vascular diseases.

Q. And you would imagine and assume an individual would be in a high state of mental shock and excited if he was brought suddenly face to face with an impending disaster like a train wreck, wouldn't you?

160

A. Yes, it is likely to excite him, that is right.

Q. You would expect it to excite him, wouldn't you?

A. That is right.

Q. You don't know anybody that wouldn't be excited under those circumstances, do you?

A. No.

Q. Now then, Doctor, your testimony now is that you can't tell this jury whether or not McDonald died a second before the collision or at some other time before that, can you?

A. Well, I am confused as regarding the application of the brakes and so forth. If you will settle that for me I can answer your question.

Q. From all you know about this case, from your own study of this autopsy report, are you able to tell this jury

whether McDonald's death occurred more than a second prior to the impact or at any other time?

A. Oh, I would be inclined to believe he died sometime before a second before.

Q. But he might have died a second before?

A. No, I think it was longer than that because the contraction of the arteries, post mortem, would have squeezed blood into the veins and out of the leg wound, for example, and in all probability into the skin so that I think he died before that, before a second or so.

Q. And that's just your opinion?

A. That is right.

Q. You are not influenced in that opinion by anything you have been told by Mr. Ray in this hypothetical question?

A. Nothing except what I have heard.

Q. And it is your opinion also that shocking, terrible fright could have added to the heart condition?

A. Yes.

Q. Could have caused and produced the death that was subsequent—

A. It could be a contributing factor.

161 Q. And death could be instantaneous?

A. Yes, that is right.

Q. And immediately upon death you would expect to note the results that were noted in this body as a result of the application of steam heat and things of that kind?

A. That is right.

Redirect Examination (by Mr. Ray).

Q. One or two questions, Doctor: The normal artery or vein in the human body has an elastic quality, hasn't it?

A. Yes, sir.

Q. Now, these veins you have described in this heart had lost that elasticity, had they not?

A. Yes, according to the post, the arteries were sclerotic and some of them profoundly so.

Q. So that the process of destroying that elasticity was far advanced?

A. That is right.

Q. And when you have that normal elasticity of the artery or vein so far towards completed destruction as you had here, the artery is not responsive, as I understood your answer to Mr. Black, to spasm or sudden contraction, or what not?

A. The particular segment that shows a marked clerosis is not responsive, that is right.

Q. Now, you have spoken something about possibilities. Was there anything in the postmortem examination to suggest to you this man died of shock or fright?

A. No.

Q. From what study you have made of that post mortem

Q. From what study you have made of that post mortem, what is your opinion as to what caused his death?

A. I think he died from cardiac failure but I don't think he died from shock.

Recross Examination (by Mr. Black).

Q. Was there anything in that post mortem that indicated that he didn't die as a result of shock and fright?

A. Yes. A shock, in a post mortem done on a pa-
162 tient who dies from shock, they usually have a concentrated blood and the vessels in the abdominal region are very, very congested with this concentrated blood. There is no mention made of it in the post at all.

Q. Well, is there mention made that that condition was not found?

A. No, but it is assumed that the—

Q. Just a minute—what is assumed—there is no mention made one way or the other, is there?

A. No, but when you do—

Q. That's plenty now on that.

A. Okeh.

Q. Do you distinguish between shock and sudden fright?

A. Certainly.

Q. Well, was there anything in the post mortem that indicated he didn't die as a result of sudden and terrific and terrible fright?

A. No.

163 FRANK R. GILBERT, a witness for the defendant, testified:

I reside at Ogden, Utah, and am employed by the Southern Pacific Company as a boilermaker in its Ogden shops, where I have worked for 20 years. I went out to the Bagley wreck the morning it occurred, along with Mr. Walker and Mr. Wade. We went into the cab where Mr. McDonald was.

I recognize Exhibit 18 as illustrating how Mr. McDonald was sitting as viewed from a certain angle in the cab. We entered the cab about 10:15.

Q. Which one of you got in there first?
A. I did.

The cab was raised up. The back end was tilted, it had pushed the top of the cab over on the boiler and had tilted the cab at about a 45 degree angle. The floor of the cab was not level. Looking from the window where I went in, it looked like McDonald was sitting there asleep, that was the first impression I had, that the man could be asleep. He was sitting on his seat with his arm over the throttle quadrant and the other arm out of the window with his head laying on his chest. I undertook to get Mr. McDonald out of the cab. There was no steam in it when we entered. I observed steam burns on Mr. McDonald. The lifting of the cab, tilting of the cab and the pushing of the top of it over the top of the boiler interfered with the steam pipes. There were two fountain valves which set right in the head of the cab. When the cab went ahead it broke these two fountain valves and left them open just inside the cab so all the steam from those fountain valves came in the cab, down in the cab, hitting the roof of the cab and went back. The window at McDonald's side was open. The window on the other side, the fireman's side, was open, and there was an opening behind at the back of the cab. The steam which was liberated in the cab escaped through these windows and the openings in the back. The steam pipes that were broken off and exposed into the cab were approximately 2 inches in diameter.

Q. Are you able to tell us what pressure the steam was under that that was exhausted from those pipes?
A. 210 pounds is working pressure on that boiler.

Q. 210 pounds?
A. 10 pounds per square inch.
Q. Did you observe the position of Mr. McDonald's feet?
A. Not his feet, his legs. I never observed whether it was the right foot—or the left foot over the right, but
164 his legs were crossed and the reverse quadrant was pressing into the left leg.
Q. The reverse lever quadrant?
A. Yes.
Q. Was Mr. McDonald's body free except at that point where that lever was pressing on his legs?
A. His body was free from the knees up.
Q. Where was his body sitting with relation to the open window?
A. Right along side of it.
Q. Would the pressure of the reverse quadrant on Mr. McDonald's leg have prevented him from getting his head and shoulders out the window?
A. No, sir.
Q. Do you remember where the reverse quadrant and lever is with relation to the normal position of the engineer in the cab?
A. The reverse quadrant was about three inches off the center in forward motion.
Q. Let's get first where it is with relation to the engineer, where he sits in the cab, where is it?
A. It would sit practically in front of him this way (indicating).
Q. Is it in position for use by the right or the left hand?
A. Well, he could use both hands. The left hand, I think, is what they use mostly.
Q. But it is where they could reach it with either hand?
A. Either hand.

* * * * *

The Court: Where were the engineer's hands?

The Witness: His left arm was over the throttle, the throttle quadrant, to the elbow and his right hand was out the window and his head was leaning on his chest.

The reverse gear was about three notches off of center, that is, three of the little marks. It was in about 25 per cent.

The valve by which he might control the air was right to his left side and it was in running position.

Q. Now, you have testified that the engineer's arm was over the throttle quadrant as is shown in Exhibit 18?

A. Yes, sir.

Q. Do you have a recollection and can you tell His Honor and the jury where the throttle was on that quadrant?

A. Well, the throttle was about half-way open, I
165 should say. The throttle swings in a circle, it is right in front of the engineer's left hand when he is sitting on the seatbox, and the throttle was half-way or part-way open.

Q. Now, you have stated that the rear end of the cab, that is the floor of the cab, was tilted from level to a rather sharp degree?

A. Yes, sir.

Q. Would that raise the engineer up to a level near the throttle quadrant?

A. Yes, sir.

Q. If he had remained seated on the flat floor of the cab, then that throttle quadrant would be somewhat above his shoulder height, wouldn't it?

A. Yes, sir.

Q. But as it was tilted, he had his arm over the—

A. Yes, sir.

Q. With his head down in the manner described. In your work as a boilermaker, do you have occasion to test steam pipes and make repairs and so forth?

A. Not the pipes, the boilers themselves.

Q. The boilers. You know something about what 210 lb. pressure means then?

A. Yes, sir.

Q. What does that mean?

A. That is a terrific amount of pressure.

Q. How long would the steam be exhausting into the cab after the pipe broke?

A. Well, two openings, the openings that was in that boiler, it would have been practically twenty minutes the fastest before it could blow out.

Q. You mean it would exhaust all the steam in the boiler in twenty minutes?

A. Yes, sir.

Q. How long after the steam broke would that steam start to exhaust in there?

A. Instantaneously.

Q. Being under 210 lbs. of pressure, then, it would come out of those fountain valves into the cab the instant the break was made?

A. Yes, sir.

Q. And then would continue to blow for approximately the period you have given?

A. Yes, sir.

Cross Examination.

166 Q. Of course, in connection with the breaking of these pipes you couldn't tell if there were say three impacts on which one of those impacts that those pipes were broken, could you?

A. No, sir.

Q. From your examination?

A. No, sir.

Q. And now, you don't know whether anybody had been in the cab of that engine before you climbed in there or not, do you?

A. No, sir, I was the first of my crowd and we were sent up to take the engineer out. I was the first of that group.

Q. You were the first of that group?

A. Yes, sir.

Q. But that was some five hours after the collision had occurred?

A. Yes, sir.

Q. And what had happened in and about that cab up to the time you entered it, you don't know?

A. No, sir.

Q. Now, of course, Mr. McDonald was in there so that you had to use a torch in order to get him out, that is, take away some of the pipes or some of the metal in there in order that you could remove him, isn't that true?

A. Yes, sir.

Q. And that was because of his legs being jammed and caught down in there in among those pipes and levers?

A. The tilting of the cab had pushed the seatbox enough to pin his feet in the air pipe and reversing gear brackets,

Q. And you had to use a torch in order to get him out?
A. Yes, sir.

Redirect Examination.

The other gentlemen and I were able to and did get Mr. McDonald out of the cab.

It was stipulated by the attorneys for the respective parties that if Mr. Welcher and Mr. Wade were sworn and testified, their testimony would be the same as that of Frank R. Gilbert.

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167 ROBERT N. BOOKER, a witness for defendant, testified:

Direct Examination.

I reside in Burlingame, California. A portion of my testimony given at another hearing was read into the record heretofore. I am General Road Foreman of Engines, Southern Pacific. I have been engaged in this work 40 years and 4 months. During some of that time I was an engineer and thereafter became foreman of engines. In my present position I have general supervision of locomotives, locomotive operation and maintenance. About 48 hours after the wreck I made an investigation at Bagley. I examined reports and conditions. I testified at the I.C.C. investigation.

Q. You heard the testimony that the normal speed along that is 60 to 65 miles an hour?
A. That is right.
Q. Did you hear testimony that the speed is usually reduced moderately as they make the turn near Little Mountain?
A. Yes, sir.
Q. And then when they come onto the tangent it is picked up again?
A. Yes, sir.
Q. Now, assume that an engineer takes his reduction at Little Mountain and then gets out on the tangent toward the Lake, for the purpose of maintaining a running speed in the neighborhood of 60 miles an hour, where would he carry his throttle?

A. Well, if he had a speed up to the maximum he wanted or was trying to attain, on that particular piece of track, he would carry what he would call a light throttle which is just a little more than a drifting throttle.

* * * * *

Q. And where would that be with relation to the point Mr. Gilbert just described?

A. Well, it would be right in that position. That is what we would call a light throttle.

Q. And where would he have his reverse lever?

A. Should have it about a 25 per cent cutoff.

Q. And where is that with relation to reverse?

A. That is just ahead of the forward center.

Q. So that if you give a pull from there you would get it in reverse?

A. That is right.

Q. Are we to understand then that in order to maintain that speed that you have described you would have that lever over almost to reverse?

A. That is right.

168 Q. 25 per cent short of it?

A. That is right. 25 per cent is as close as we can work to the center.

Q. And where would he have his air, automatic air?

A. Oh, he would have that in running position.

Both sides rest.

Mr. Ray: Comes now the defendant, Southern Pacific Company, in each of these cases consolidated for trial and moves the Court for an order directing the jury to return a verdict in favor of the defendant and against the plaintiffs on the following grounds and for the following reasons:

First, it has heretofore been ruled by this Court, and it stands admitted upon the record that the deceased Jack Francis and Delphia Packer Francis were at the time of their injury and death engaged upon an interstate trip, riding upon a pass, which released and discharged the defendant Railroad Company from negligence. So that the only issue before this court is whether this accident, the wreck, the

accompanying injury and death of Jack Francis and of Delphia Francis, resulted from the wilful and wanton misconduct of Engineer McDonald, and there is no evidence upon the record which would justify a jury in finding and determining that Engineer McDonald was guilty of wilful or wanton misconduct.

The pretrial order limits the issues before the Court and jury to a determination of that question with the possibility that proof might be offered of the wilful and wanton negligence of the Fireman Hardman. There is no evidence from which the jury could find that Hardman was guilty of wanton and wilful misconduct.

Now, first, as to Fireman Hardman, his testimony has been given, he stated what he did. Counsel for the plaintiffs put on Campbell, a fireman, qualified him as one familiar with the duties of firemen, and asked what he would do under the same circumstances and he said, "Put out the fire,"—do exactly what the firemen did, so I will spend no time with relation to Hardman.

After arguments the Court stated:

The Court: Well, Gentlemen, I am inclined to think under all of the evidence in the case, that I should let it go to the jury on the question of whether or not this man McDonald, the engineer, was alive when he passed both these signals and was alive up to the time that it is claimed he made this service application or emergency application, whichever it was, as claimed some 1300 feet beyond the second one, but if they should find that he was dead at that time and dead when he passed the second signal, their verdict ought to be for the defendant, and within those limitations I believe I will take the verdict of the jury and overrule your motion.

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169 It is agreed by and between respective counsel for the parties to this appeal that at this point the requests for instructions as submitted by both parties, were discussed by Court and Counsel out of the hearing of the jury and that the Court indicated to Counsel what his attitude was with regard to the requests and each of them and

informed counsel which requests he intended to give and which he intended to deny and which he intended to give in substance or in part.

Thereupon the case was argued to the jury by counsel for the respective parties and the Court then instructed the jury as follows:

170 The Court: Ladies and gentlemen of the jury, you have before you for consideration and determination two cases—two actions brought by the same plaintiffs represented by their guardian. These plaintiffs are the three children of the deceased Jack Francis and his wife who were killed or met their death as a result of a collision occurring on the railroad of the defendant company on the morning of the 31st day of December, 1944. They have brought these cases to recover damages for the death of their two parents as I have stated. These parents and the children with them were at that time residing at Carlin, in the State of Nevada. Mr. Francis, the father, was an employee of the Southern Pacific Company, at that time being engaged in the train service. They had been making a visit during the Christmas week, according to the testimony of some of the witnesses, to their parents who resided in Ogden, and were returning home on that train that morning. They were riding on a pass, a railroad pass issued by the defendant Southern Pacific Company. That pass recited and provided that the railroad company could not and would not be held liable for any negligence of its employes by which these plaintiffs might be injured.

Now, the Supreme Court of the United States has held that that waiver is valid and that when people sign such a waiver and ride on a pass containing it, they are not permitted to recover for just ordinary negligence.

So that this case has been submitted to you and will now be submitted to you upon the question of whether or not Mr. McDonald, the engineer on that second section that morning, was guilty as charged in the complaint in each case of wilful and wanton misconduct.

Now I will read you a more lengthy and definite statement as to the definition of wilful and wanton misconduct but I will state now that it implies a mental state. Negligence—just ordinary negligence does not imply any mental purpose. It is just thoughtless carelessness. For instance, ordinary negligence is usually defined something like this: it is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under such existing circumstances would not have done. So there is not any wilfullness or wantonness involved in ordinary negligence.

171 This pass which these people were using on that occasion exonerated and released the defendant company from that sort of negligence. It did not release them from willful misconduct or wanton actions.

In order that you may have your minds definitely fixed upon the issue or issues to be determined by you, perhaps it would be well for me to rehearse with some little detail which he intended to deny and which he intended to give in the facts in this case which do not seem to be in controversy. It gives a background for your consideration and final determination of the actual issues to be determined by you.

On that morning, according to the testimony of the witness, and it seems to be undisputed, three trains went out on that track going west. The front train was a freight train. It was followed by the section whose engineer testified in this case, Mr. Ware. That section was followed by the second section whose engineer was Mr. McDonald. The exact spacing of time between the departures of these trains I do not now recall but they were spaced some time between them. It seems the freight train after it reached some point going west, the exact point designated I do not now definitely recall, something went wrong with it some way or other and it stopped for repairs. The first section, the one on which Mr. Ware was the engineer, followed and he stopped, and as I recall the freight having started up, he began to pull up too at one time. The train of which Mr. McDonald was the engineer followed and it ran into the rear end of section No. 1, and the parents of these boys were

either killed outright or died from injuries received by reason of that collision.

It seems from the testimony; and that is undisputed I believe, that Mr. McDonald after the collision had occurred and the engine had stopped, was dead sitting in his seat. The testimony is that one of his legs was broken and some other part of his body broken likewise. The doctors who testified in this case who made an examination of his body after death testified before you—or one of them did—and gave it as his opinion that the death was the result of heart disease and heart failure. The second doctor called, as I now recall, in the main confirmed his conclusion.

172 I believe this general statement is not in dispute between the parties in these cases.

The firemen who was on the engine with Mr. McDonald testified in this case. You will recall his testimony and it has been discussed by counsel before you. His, as I recall, is the only direct testimony as to Mr. McDonald or his activities or the lack of his activities immediately preceding the collision.

There is also testimony by witnesses who were riding in the rear coach of this train being pulled by Mr. McDonald's engine and they testified about certain shocks spoken of here and its effect on them when they occurred, and how much time elapsed between these shocks that they testified about and the collision, if any. Counsel have discussed their testimony pro and con. Also in relation to any modification made or that may have been made in the testimony as given before you or as read from the testimony heretofore taken of them.

Now, with this statement of the background of the conditions seemingly existing, the question in dispute here is primarily what the state or condition of Mr. McDonald was preceding this collision, and what the state of his mind was, if he was alive and had one.

Now, that you may appreciate just what that means I will read to you the meaning of wilful, wanton misconduct as charged in the complaint and as defined by the courts, and

ask your attention to that meaning because this case must be determined upon it as a standard of law relating to this particular subject matter. I read:

To constitute willfullness, wantonness or recklessness there must be conduct manifesting a reckless disregard of consequences under circumstances which indicate that the act done or omitted will naturally or probably result in injury.

To state the matter another way: To constitute willfullness, wantonness or recklessness within the meaning of this rule, mere negligence is not sufficient but there must be either a design or purpose to inflict injury, or conduct manifesting a reckless disregard of consequences under circumstances where the act done or omitted probably or naturally results in injury, or, in other words, an act done or omitted with the consciousness at the time that injury will naturally or probably result therefrom.

173 In this connection you are instructed that if you find by a preponderance of the evidence that James McDonald drove his train past block signal 7649 at a time when said block signal was in its "stop" position, and having the ability or opportunity to do so, did not bring the speed of his train under control so that he could stop said train short of the block commencing with block signal 7639, and that his train came into violent collision with passenger train No. first 21, and that such conduct on the part of McDonald manifested a reckless disregard of consequences under circumstances where the act done or omitted would probably or naturally result in injury or death to others, then his conduct would constitute willful and wanton negligence.

Having that definition in mind— it has been discussed before you and it is for your determination—what was the state of mind as indicated and required under that definition of Mr. McDonald when he passed, if he did pass consciously this last block signal?

There is testimony in the case, as argued by counsel in behalf of the plaintiffs, that he must have been alive at that

time because it is argued by counsel, as you know, based upon the testimony of witnesses given, that he must have turned on the air—the brakes—after he had passed that last block signal.

On the other hand, as you will recall, it is contended by the defense that whatever shocks, if they may be so-called, that may have been observed by these respective witnesses, came and were the result of the collision.

Well, after all, it is for you to determine from all of the evidence in the case whether you can make a finding by a preponderance of the evidence that he was alive at that time and that these shocks, if there were such shocks, were the result of his conscious and living manipulation.

With respect to the signal first encountered—No. 49—I charge you that he had a right to pass that signal because he would hardly be able to know what its showing was unless he did pass it, or approach so near to it that it would not be feasible to stop before reaching it.

174 It appears from all of the testimony in this case that this block signal system has been established, and I believe it is almost universal with railroads now and required by law—they are so constructed that a train between two signals on a block will show its presence on that block by the two signals behind it—probably before it too—being red. These block signals are a mile apart, and it seems that they are constructed in this way so that two will show so that any approaching train, with a car standing as in this case, in a block, will be advised of its presence on that block at least a mile from it, thus affording ample opportunity for control of the engine of the train thus warned.

Now, there is a rule of the railroad that requires when such signal appears that the train stop within that first block, between those two signals.

Well, this train did not stop between those two signals. Mr. McDonald knew that this other train was ahead of him, and he knew of course that it was in the block ahead o the one in which he then was. Now what else he may have known on a straight track we are not advised. There is some

evidence in these cases that there were flares out in the neighborhood of where this first train was stopped. Now the question is, assuming that Mr. McDonald was alive when he entered this block, was it necessary that he should come to a stop under the condition existing, or was it negligence, just straight, pure, ordinary negligence if he did not?

If at that time and while he was in that block he made up his mind to act in accord with the definition of willful, wanton misconduct, recklessness, as I have defined it to you, and proceeded on in that state of mind, even though he may have died in the interim, having control of his train, leaving it free to go forward, the conditions of the definition would be satisfied.

But if, on the other hand, he had in mind that this train was ahead of him and that is where the difficulty was, and he could see or had reason to believe on a straight track that he could approach it gradually, he might be guilty of ordinary negligence and not guilty of willful misconduct.

All we know as a certainty is that he was dead in the cab. There is no presumption that a person willfully and recklessly determines to act in such way as to bring injury upon some other person. It must be proven by a preponderance of the evidence.

175 So that it becomes a question for you jurors to determine as one of the crucial, and the crucial issue in this case, as to whether this engineer, Mr. McDonald, was guilty of willful and wanton misconduct in the operation of that train, or whether in the exercise of what he considered ordinary care he manipulated his engine so he thought he could approach it without danger. He might have been guilty of ordinary negligence but not of willful negligence under those conditions.

If he died before these questions arose at all after he had passed that first signal, or if he was stricken with such severe, excruciating pain that would excuse him from taking action or being able to think with that degree of care that a person in health and reasonable state of mind would be able to think and form opinions and act upon them, then he would

not, and of course could not, be guilty of willful and wanton misconduct.

Counsel have requested a number of instructions which I will now give, although it may be to a certain degree they repeat what I have already stated to you.

I charge you that an employer is civilly liable for the willful or wanton misconduct of an employee committed while in his service and within the scope of his employment, that is in the transaction of the employer's business, and if you should find by a preponderance of the evidence that the death of Delphia Packer Francis and Jack R. Francis, in either case, was proximately caused by reason of the willful or wanton misconduct of James McDonald, then I charge you that such willful or wanton misconduct is imputed to and becomes the willful and wanton misconduct of the defendant herein.

You are instructed that if you find from a preponderance of the evidence that passenger train No. second 21 was driven by block signal No. 49 and that the speed thereof was not brought under control so that it could be stopped before it entered the next block commencing with block signal No. 39, and that the said passenger train No. second 21 went into violent collision with the rear of passenger train No. 21, and that such conduct constituted willful or wanton misconduct on the part of the engineer of the second 21, and that such willful or wanton misconduct, if any, was the proximate cause of the death of these two, deceased father and mother, then you would return a verdict in favor of plaintiffs and against the defendant and assess their damages as in these instructions set forth.

176 If under the court's instructions you find that the plaintiffs, naming them, are entitled to a verdict, you will award them such sum as under all the circumstances of the case may be just compensation for the pecuniary loss they have suffered by reason of the death of their mother and father, as the case may be. In determining the pecuniary loss, if any, you may take into consideration the pecuniary value, if any, of the society, comfort, care, protection and

companionship which each plaintiff has lost by reason of the death of their parents, whichever it may be.

In determining the pecuniary loss, if any, you may also consider the attention, instruction, training, advice and guidance which a mother or father of the deceased's disposition, character, habits, intelligence and devotion to his or to her parental duties, or indifference thereto, as shown by the evidence, and which either one in either case would reasonably be expected to give to said children during their minority, and the pecuniary benefits therefrom from either to said children, including the pecuniary value of the same, if any, in the damages assessed.

You are instructed that the burden rests upon the plaintiffs to prove by a preponderance of the evidence the elements of damage, if any, to which the said children of the deceased may be entitled.

The Court: That is the request which you have offered in behalf of the mother. Where is the one in behalf of the father?

Mr. Roberts: That is in the other.

The Court: They should have been run together.

Mr. Roberts: In view of the fact there were two cases I wanted to keep my request separate, Your Honor.

The Court: Inasmuch as the instruction relating to the mother differs a little bit from the instruction which will be given with respect to the father, I will use the father's instruction also. which reads:

If under the court's instructions you find that the plaintiffs, naming them, are entitled to a verdict, you will award them such sum as under all the circumstances of the case may be just compensation for the pecuniary loss they have suffered by reason of the death of their father.

177 In determining the pecuniary loss, if any, you may consider not only the financial support, if any, which the said plaintiffs would have received from the deceased their father except for his death, but also the pecuniary

value, if any, of the society, comfort, care, protection and companionship which each plaintiff may have lost by reason of the death of his father, and in determining the pecuniary loss, if any, you may consider the probability of the said deceased acquiring an estate during his lifetime which the said plaintiffs might inherit.

In determining the pecuniary loss, if any, you may take into consideration the attention, instruction, training, advice, and guidance of the father and his disposition, character, habits, intelligence, and devotion to his parental duties, or indifference thereto, as shown by the evidence, he would reasonably be expected to give each child during the minority of such child, and the pecuniary benefits therefrom to his said child, and include the pecuniary value of the same, if any, in the damages assessed.

In determining the financial support, if any, which the said plaintiffs would have received from the deceased, you should compute the present value of the—no, I will decline to give that portion of your request, and in lieu I will state that in determining that question of pecuniary support you have a right to take into consideration in arriving at your verdict the statement that was introduced in evidence showing the present worth or the creation of annuities, as one factor to be considered by you, but you are not bound to determine your verdict upon it—or solely upon it.

You are instructed that the burden rests upon the plaintiffs to prove by a preponderance of the evidence the elements of damage, if any, to which the said children of the deceased may be entitled.

The Court: I believe I have given your requested instructions. I will now turn to the requested instructions of the defendant.

I think I have instructed in the instructions given your request No. 1.

I think I have given your request No. 2, in substance and effect.

178 I will give your No. 3—it may not be fully covered by the instructions already given. It reads:

In these cases plaintiffs predicate their right to recover upon the wanton and willful misconduct of the defendant in running its train past certain block signals which were in "Stop" position.

You are instructed that the mere fact that the train ran past the signals is not sufficient of itself to justify a verdict against the defendant. Willful and wanton misconduct is never presumed. On the contrary it is presumed that a normal individual will exercise ordinary care for the protection of himself and others. The burden rests upon the plaintiffs in these cases to prove wanton and willful misconduct, and if you should find that the—I think I will omit that.

Mr. Ray: I have no objection.

The Court: Strike out "and if you should find".

Mr. Ray: I have no objection to your omitting the balance of that.

The Court: I will give your request No. 4.

I charge you that it is the imperative and sworn duty of the jury to hear and determine these cases precisely the same as if they were between two individuals. The mere fact that the plaintiffs are individuals and the defendant is a corporation should make no difference whatever with the jury. In determining questions of fact you are not at liberty to indulge in conjectures nor base it upon evidence not introduced in this case, nor are you at liberty to follow your own ideas of what the law is or ought to be. On the contrary, you should look solely to the evidence for the facts, and to the instructions given you by the court for the law, and return verdicts according to the facts established by the evidence and the law as laid down by the court, without reference to the individual or private character of the plaintiffs, or to the public or corporate business or character of the defendant, but should require as much evidence to find an issue against a railroad company as you would against an individual.

179 A railroad company is entitled to the same protection of the law as is an individual.

Sympathetic feelings have no place whatever in the trial of a case in a court of justice. You should disregard all such influences and determine the cases at Bar according to the law and evidence given you in open court, regardless of who the parties are, and with fairness and impartiality.

If under all of the evidence you should find for the plaintiffs, it will then be for you to assess the amount of damages, if any, sustained by plaintiffs. In assessing damages you cannot take into consideration any physical or mental suffering on the part of plaintiffs' parents because of the injury to or death of said parents. Nor can you take into account any mental grief or anguish which the plaintiffs, or other members of their family, may have suffered. The law does not attempt to compensate for mental grief or anguish in an action like this but confines recovery to the pecuniary loss sustained by the plaintiffs, as I have already indicated.

In connection with evidence dealing with expectancy of life, you should take into consideration the uncertainty of life itself and uncertainty of health and the uncertainty of continued employment.

The mere fact that I have instructed you upon the measure of damages should you find for the plaintiffs in these cases, is not to be taken by you as an intimation that the court either believes or does not believe that plaintiffs are entitled to recover such damages. Instructions upon the measure of damages are given to guide you in case you find that plaintiffs are entitled to recover, as it is the duty of the court to charge the jury fully upon all the law of the case, but should you determine from the evidence that the plaintiffs are not entitled to recover, then and in that case you will entirely disregard the instructions given you upon damages.

I instruct you that you are the exclusive judges of the credibility of the witnesses and of the facts proven.

In judging of their credibility you have the right to take into consideration their deportment upon the witness stand, their interest in the result of the suit, if any; the reason-

ableness of their statements; their apparent frank-
180 ness or candor, or the want of it; their opportunities to know and understand, and their capacity to remember.

In order for the plaintiffs to recover in these cases as I have told you, they must prove their case or cases by a preponderance of the evidence.

By a preponderance of the evidence is meant the greater weight of the evidence, that which is the more convincing as to its truth. It is not necessarily determined by the number of witnesses for or against a proposition, although all things being equal it may be so determined.

You should weigh the evidence carefully and consider all of it together. You should not pick out any particular fact in evidence, or any particular statement of any witness, and give it undue weight. You should give such weight to inferences from the facts proven as in fairness you think they are entitled to.

You should consider all of the evidence impartially, fairly, and without prejudice of any kind, and from such consideration, in connection with the instructions given you by the court, you should reach such verdicts in these cases as will do justice between the parties.

When you retire to consider your verdicts you will select one of your number foreman. Your verdicts must be in writing and signed by your foreman. All of you must agree upon your verdicts.

Two forms of verdicts will be supplied you, one in the case covering the death of the father, the other covering the death of the mother. Make separate findings and return separate verdicts in the two cases.

When you have determined what your verdict shall be, if you find for the plaintiffs you will find a blank space in the forms of the verdicts in which you can write the amounts or your finding. The second form of verdict in each of the cases will be that you find for the defendant, no cause of action, and if your finding is such, your foreman will sign that verdict. Of course your verdicts should be consistent

with each other. If you find for the plaintiffs on one, you should find for the plaintiffs on the other. If you find for the defendant on one, you should find for the defendant on the other.

The Court: Now, have I omitted anything?

181 Mr. Roberts: There was one suggestion I had, your Honor, which I failed to put in the instructions and which we discussed before in the argument; that was that the jury, in each case, could take the damage of each child and then when they returned the verdict merge it into each case—if I make myself clear.

The Court: It is a joint suit brought by the three plaintiffs and of course each one of them is entitled to be considered as a plaintiff and make return accordingly, but it is a joint suit, however, and must be a joint verdict.

Mr. Ray: Just one observation, if the Court please. These cases have the same title and I do not believe the jury could tell by the title which one relates to the father and which to the mother. They have separate numbers, however, 906 and 907, and 906 involves the father and 907 the mother.

The Court: Will you folks agree that you may write the name—what is the name of the father?

Mr. Black: Jack Francis; the mother was Delphia Packer Francis.

The Court: Write one on the top of the verdict so they can distinguish. They might forget the number.

Mr. Ray: We have no exceptions to the charge.

The Court: Do you desire to make any exceptions? If you do the law requires that you do it before the jury retires to go to the jury room. I don't know why they do it but that is the rule.

Do you want to save exception to that—

Mr. Roberts: Yes, I do, your Honor.

The Court: I refused two of your requests, and that related to the questions of the effect of that release.

Mr. Roberts: That is right, but I think exception should be taken to those portions of the instructions as given.

The Court: You do not have to do it in the presence of the jury if you want the jury excused.

Mr. Ray: I would be glad to waive the taking of the exceptions in the presence of the jury, then you wouldn't have to hold the jury.

182 The Court: It may be some language he excepts to I would want to correct. That is the reason I want to know what he is talking about; that is the reason I prefer to keep the jury. Come up and tell me what you have in mind.

Mr. Roberts: Well, that is the thing I have in mind, your Honor.

The Court: What is it?

Mr. Roberts: We except to those portions of the Court's instructions which exonerate and release the company from liability from ordinary negligence.

The Court: Yes, you can have that of course. That is your request No. 1 I believe.

Mr. Roberts: No. 1 and 2, your Honor; the two of them in each case relate to that.

The Court: That is all right.

Mr. Roberts: I think that is the extent of them, your Honor.

* * * * *

Mr. Roberts: I am wondering if the record is clear that the plaintiff is excepting in each case to the refusal to give their request No. 1 and also excepts to No. 2. I don't know that he got that.

The Court: Yes, the record is clear, and in the presence of the jury.

Mr. Black: The exhibits are in order, your Honor.

The Court: Has the bailiff got them? Just as well take them along with you.

You may retire with the bailiff.

(Whereupon the jury retired.)

(At 4:45 P.M. the jury was called in, admonished and excused to 9:30 A. M. May 2, 1946.)

May 2, 1946, 9:30 A.M.

(One juror late in arriving.) (Upon his arrival the following proceedings were had.)

The Court: That tardy juror may be fined by the foreman at his discretion.

(Jury retires to jury room.)

(At 10:34 A.M. the jury returned into court.)

183 The Court: Mr. Foreman, have you agreed upon your verdicts

Foreman: We have, your Honor.

The Court: Will you pass them to the bailiff? Will you read the verdicts to the jury.

(Clerk reads verdicts.)

The Court: Here is a side verdict you may read.

Clerk: (reads) We the jury do hereby fine Mr. Winn two pounds of butter to be mailed to the Honorable Judge of this Court.

Foregoing Statement of Evidence and Proceedings at the Trial filed in U. S. District Court September 30, 1946.

Plaintiffs' Requested Instructions.

184 Come now the plaintiffs and respectfully request the Court to instruct the jury in accordance with each of

the following requested instructions, numbered from 1 to 8, inclusive.

RAWLINGS, WALLACE & BLACK,
PARNELL BLACK,
BRIGHAM E. ROBERTS,
Attorneys for Plaintiffs.

Received a copy of the foregoing Plaintiffs' Requested Instructions this 30th day of April, A. D. 1946.

.....,
Attorneys for Defendant.

Filed in United States District Court, May 1, 1946.

Plaintiffs' Requested Instruction No. 1.

An employer is civilly liable for the negligent acts or omissions of an employee committed while in his service and within the scope of his employment, that is, in the transaction of his employer's business, and, if you shall find from a preponderance of the evidence that the death of Jack R. Francis was proximately caused by reason of the negligence of James McDonald, then I charge you that such negligence is imputed to and becomes the negligence of the defendant in this case.

Filed in United States District Court, May 1, 1946.

Plaintiffs' Requested Instruction No. 2.

You are instructed that if you find from a preponderance of the evidence that Passenger Train No. Second 21 was driven by one or more block signals, which said signals were in a stop position displaying red, and into violent collision with the rear end of Passenger Train No. First 21, and that driving said Second 21 past one or more block signals constituted negligence and that such negligence proximately caused the injuries to and death of Jack R. Francis, then you should return a verdict in favor of plaintiffs and against the defendant and assess their damages as in these instructions set forth.

Filed in United States District Court, May 1, 1946.

Narrative Statement of Proceedings Had at the Presentation of Plaintiffs' Motion for a New Trial—June 21, 1946.

206 Mr. Black: Your Honor, that is a motion for new trial filed by the plaintiffs, and there is a separate motion for a new trial, your Honor, in each of these cases. The motion is the same—based on the same grounds, supported by the same showing. There are three motions—Mr. Roberts and I desire to present to your Honor only three. There is one that concerns the testimony of Dr. Ogilvie. The other the matter of Rule 51 on taking exceptions in the absence of the jury. The third matter which I shall discuss briefly is the matter that we have presented by the affidavit in support of the motion for a new trial which was filed the other day.

Mr. Ray: If the Court please, before the motion is presented by Mr. Black I would like to make a record in respect to certain of these proceedings.

The Court: You may do so.

Mr. Ray: The records of the Court in these cases show that judgment was entered upon the verdict on May 2nd. On May 8th motion for new trial was served upon counsel for the defendant. It was thereafter filed with this Court. On June 13th a purported amended motion was served upon counsel for the defendant and filed some time thereafter. On June 18th affidavits purporting to be in support of the amended motion for a new trial were served upon counsel for defendants, and they were thereafter filed with this Court.

Defendants in each of these cases moved to strike the so-called amended motions served June 13th upon the ground that the amendment was served out of time, and particularly defendants moved to strike from the so-called amended motion for a new trial paragraphs 16, 17, 18 and 19 upon the ground that they are in nowise germane or relevant to any matter set forth in the motion for a new trial served on June 8th.

Defendant moves in each of these cases to strike the affi-

davits served June 18th upon the ground that they were served out of time.

Further in support of the motion to strike particularly paragraphs 16, 17, 18 and 19 of the purported amended motion for a new trial, defendants move to strike upon the ground that the issue raised by those paragraphs is
207 raised out of time and cannot be raised after verdict.

I remind your Honor—

The Court: Will you state for the record what those issues are?

Mr. Ray: Paragraph 16 of the so-called amended motion for a new trial reads: "The Court ought to grant a new trial in the exercise of its inherent power to prevent injustice and to secure to all litigants a fair and impartial trial."

The Court's power to exercise any such discretion as is invoked in paragraph 16 expired ten days after judgment was entered, under the Rules of the Court.

Paragraph 17 reads: "That the jury panel from which the jury in the above entitled case was selected and the jury finally selected were mostly business executives or those having the employers' viewpoint, who were purposely selected on said panel, thus giving a majority representation to one class or occupation and discriminating against other occupations and classes, particularly the employees and those in the poorer classes, who constitute by far the great majority of citizens eligible for jury service, and that by reason thereof the plaintiffs herein were denied a fair and impartial trial by a fair and impartial jury."

Paragraph 18 reads: "That in selecting the jury panel from which the jury in plaintiffs' case was chosen, persons of working classes and wage earners were purposely left off such panel and as a result no jurors representing such classes were upon the jury impaneled in plaintiffs' case, thereby denying to plaintiffs a fair trial before a fair and impartial jury."

19. "That in selecting a jury panel from which plain-

tiffs' jury was chosen, discrimination was made against the poorer classes and wage earners and none of such were on the plaintiffs' jury, although a majority percentage of such clasess constitute the citizenry of the State of Utah, thereby denying the plaintiffs a fair trial before a fair and impartial jury."

The Court: I suppose that is supported by something?

Mr. Ray: Not suported by anything that is properly before your Honor.

The Court: What is it supported by?

208 Mr. Ray: There is an affidavit.

The Court: Read it.

Mr. Ray: An affidavit served on the 19th of June.

The Court: Anyway *lets* read it.

Mr. Ray: Read the affidavit?

The Court: Yes.

At this point the Affidavit of Parnell Black set forth in full in this record was read to the Court.

Mr. Ray: Then attached to that are the exhibits referred to in the affidavit. Does your Honor want them read?

The Court: What is in it?

Mr. Ray: Well, the first exhibit is list of jurors for 1944, 45 and 46.

The Court: Does it purport to give what their occupation was?

Mr. Ray: Yes, it purports to give what the occupation was.

The Court: That is all right; you need not read it.

Mr. Ray: Then there are 66 statements from union members stating whether or not any of the persons listed in these affidavits belong to their union.

The Court: I see. Well, is it your theory, Mr. Black, it is the duty of the commissioner and the clerk to find out who belongs to a union and make selection from them?

Mr. Black: Your Honor, it is the duty of the clerk and the jury commissioner to see to it that a fair and representative jury panel is brought before this Court for the trial of this case.

The Court: All right; I will suspend ruling on your motion. You may swear the clerk and the commissioner and examine them, see what their method is.

(Clerk of the court and jury commissioner sworn.)

V. P. AHLSTROM was thereupon called to the witness stand and being first duly sworn, testified as follows:

Direct Examination (By Mr. Black).

Q. You may state your name and address and your official position, Mr. Ahlstrom.

A. V. P. Ahlstrom—

The Court: I think we will do this in the regular
209 way. I am making Mr. Ray call these men.

Mr. Black: That is agreeable, your Honor.

Mr. Ray: Of course I will conform to your Honor's suggestion, but I want the record to show that I object to this proceeding upon the ground that the affidavits and the whole subject are not properly before the Court.

The Court: Yes, that may be all true enough in the final result, but we want to find out what the procedure is.

Mr. Ray: You would like to have me examine Mr. Ahlstrom?

The Court: I will let you examine him and let Mr. Black cross examine him.

(By Mr. Ray.)

Q. Mr. Ahlstrom, you are clerk of this Court, are you?

A. Yes, sir; since January 1st, 1945.

Q. And prior to that what was your occupation?

A. I was chief deputy clerk of this Court for 14 years.

Q. As clerk of the Court and as chief deputy have you had anything to do with the selection of jurors to serve on petit juries in this Court.

A. That is true.

Q. What have you had to do with that?

A. Well, prior to July—pardon me—prior to January when Mr. Wilson, W. B. Wilson, was clerk of this Court, I did assist him occasionally in the selection of jurors, and of course since January 1st, 1945, since I have been clerk I have done the selecting—that is, myself and the jury commissioner.

Q. How is the jury selected as far as your office is concerned, Mr. Ahlstrom?

A. I gather jury information from various sources.

Q. What sources?

A. City directory; the Polk city directory primarily.

Q. Any others?

A. That is the principal source.

Q. The Polk city directory of what cities?

A. Of Salt Lake City and of Ogden.

Mr. Black: What is that last, please?

210 The Court: You might state how they divide the work.

A. The work has been divided and it has been that way I guess for a matter of years—I presume it has—that the clerk has Salt Lake, Ogden and Cache County, and the jury commissioner has the balance of the state in which to choose his jurors from.

Q. (By Mr. Ray) And as to number of jurors selected, how was that divided?

A. Half and half; 50-50.

Q. And how is your jury list maintained?

A. I don't believe I—

Q. How many do you have in your jury list?

A. Oh, we have a jury box that is maintained by statutory requirement that three hundred or more names must be in the box prior to the calling of a jury, which is called by the judge—which is drawn by the judge.

Q. And from time to time from that list does His Honor draw jurors for service at the terms of Court as they come around?

A. That is true. Jurors are drawn in open court by the judge.

Q. From the list of three hundred or more prepared by

you and the jury commissioner in the manner you have described?

A. That is correct.

Q. Who is the jury commissioner?

A. William G. Hampton, residing at Murray, Utah.

Q. So that in the main you select jurors from the city directory of Salt Lake City and similar publication covering Ogden?

A. Yes; and then I might add that I have been on the lookout for good jurors; I occasionally think of some friend perhaps that would make a good juror, or I perhaps meet somebody casually that I think would be a good juror, and I put his name in the box.

Q. Do you exclude in the selection of jurors any class of persons?

A. I have never in any case deliberately excluded any one from jury service.

Q. Do you have access to or are you familiar with the statutes of the State of Utah which provide certain exemptions?

A. I am familiar with them. Altering and modifying my prior statement, of course I would not put anybody into the box knowing that they have a statutory
211 exemption as required by state law.

Q. For instance, who do you have in mind as having or enjoying a statutory exemption?

A. I have in mind a druggist; I have in mind a lady juror with minor children; I have in mind railroad employes—that is, not all railroad employes—firemen, engineers, conductors, station agents.

Q. Such persons as enjoy or have the right to claim exemption under the state statute?

A. Yes.

Q. Doctors?

A. Yes, sir.

Q. School teachers?

A. School teachers.

Q. Firemen?

A. Firemen.

Q. Policemen?

A. Policemen.

Q. Whatever they are.

The Court: You might add lawyers too.

Q. Yes, lawyers.

A. Telephone employes.

Q. Do you have before you as you do this work the list provided by the statute?

A. Yes, I do; I have it before me.

Q. Read that.

A. And I also mail Mr. Hampton a copy of this taken from 48-0-10 from the Utah Code Annotated of 1943.

(Reads) "A person shall be exempt from jury service who is:

(1) A judicial or civil officer of the United States, or of this state, or who is a member of the national guard;

(2) A person holding a county, city, town or precinct office;

(3) An attorney and counselor at law;

(4) A person editing a newspaper or periodical;

(5) A teacher in a university, college, academy, or school;

(6) A practicing physician or surgeon;

(7) An officer, keeper or attendant of an almshouse, hospital, asylum or other charitable institution;

(8) A person engaged in the performance of duty
212 as officer or attendant of a county jail or of the State Prison;

(9) An express agent, mail carrier, telegraph or telephone employee, miller or keeper of a public ferry or toll gate;

(10) A dispensing druggist of a prescription drug store;

(11) A superintendent, engineer, conductor, fireman or station agent of a railroad;

(12) A person drawn as a juror in any court of record in this state upon a regular panel who has served as such within a year; but this exemption shall not extend to a person who is summoned as a juror for the trial of a particular case;

(13) An active member of a regularly organized fire company of any city or town; or,

(14) A female citizen who has the active care of minor children.

Q. In the selection of jurors have you excluded any class of persons by reason of occupation, social, religious or political status, other than those you have just read?

A. I have never done that.

Q. When is the jury drawn by the Court with relation to the commencement of trials?

A. Usually two weeks—I say usually—it is almost invariably two weeks time between that and the time the Court starts; two weeks interim for the U. S. marshal to summon them by registered mail.

Mr. Ray: I ask that for illustrative purposes.

Q. Was a list of jurors drawn in the manner you have described from the jury list of 300 or more in March or April prior to the trial of last term's cases?

A. It was.

Q. Do you have or can you put your hands on a copy of that?

A. The venire that is in question herein was drawn March 28, 1946, returnable for April 15th.

Q. Now do you have that before you?

A. I do. That is the original venire.

Q. Will you refer to it for a moment?

A. Yes, sir.

Q. You have stated that in the practical division of the work between you and Mr. Hampton you have drawn the list of jurors from Salt Lake County—Salt Lake City.

213 A. I put them in the box; I do not draw them, I put them in the box.

Q. The second name on the venire is Oliver H. Brown.

A. That is true.

Q. Did you draw his name?

The Court: You mean did he put his name—

Q. (By Mr. Ray) Did you put his name in the list?

A. Yes, I put that name in the list.

The Court: That means in the box?

A. In the box—pardon me.

Q. (By Mr. Ray) You selected him to become a part of the—his name to go in the jury list?

A. That is true.

Q. Did you know Mr. Brown?

A. I did not.

Q. Did you know whether he belonged to a labor union or not?

A. I did not.

Q. Did you know when you drew him whether he was a salaried employee or wage earner?

A. I did not.

Q. Did you make any inquiry to learn that?

A. I did not. I determined he was an employee of the Utah Power and Light Company. Later when he came to trial he said he had been retired from the Utah Power and Light.

Q. But you say you made no inquiry to learn whether he belonged to the union, or whether he was a wage earner, a salary earner, or an executive?

A. No, sir, I did not.

Q. So that whether he was or was not a wage earner, whether he was or was not a member of a union had no influence upon his selection?

A. No, sir.

Q. Now, is that generally true of the names selected by you to become part of the jury panel?

A. Yes, that is true. I have no way of knowing whether a man is working on a daily salary or a monthly salary or an hourly salary. I don't know if he belongs to
213 organized labor or not. I have no idea whether he belongs to either particular political party. That is no concern of mine either.

Q. So that the situation as respects Mr. Brown is typical, is it?

A. That is typical. I try—I have tried in all instances to get a fairly good cross section of residents—or of people covering my jurisdiction.

Q. Now, it is alleged in the affidavit, Mr. Ahlstrom—it is stated in the amended motion that most of the jurors

were business executives or those having the employers' viewpoint who were purposely selected on said panel. What have you to say with respect to that?

A. Well, "purposely selected on the panel"—I don't hardly—it is not clear to me what that means.

Q. Let me put it this way: Were they selected purposely by you because you thought they were business executives?

A. No, sir; no, sir. Of course, as stated before, the panel of seventy names is drawn by the Court.

Q. I am talking about your list; do you draw men purposely because they are business executives?

A. Absolutely not.

Q. Do you draw them purposely—

The Court: Don't use the word "draw"; that applies to the Court. He puts them in the box.

Q. (By Mr. Ray) Do you choose them and put the names in the box because you think they are business executives?

A. Not because they are an executive. I will pick a business executive from time to time, yes, sir, because that comprises a cross section.

Q. Is it your purpose—put it this way—is it your purpose in selecting these names to choose only persons who have business executive jobs or have their viewpoint?

A. No, sir, in no event.

Q. Do you choose or reject any name because you think the person whose name is rejected has or does not have a particular viewpoint?

A. No, I have never discriminated against—that
215 is, I have not—I have never refused to put any name in the box—

Q. Coming back to Mr. Brown, as an ilustration again; did you know what his viewpoint was?

A. No, sir, I did not.

Q. Did you have any idea what it was?

A. I did not.

Q. So that you did not select Mr. Brown because of his viewpoint?

A. No, sir.

Q. Did you have any idea what it might be?

A. No, sir, I did not.

Q. Did you have any idea what his occupation was at the Utah Power and Light?

A. I did not.

Q. It is alleged in paragraph 18 of the amended motion that persons of the working class and wage earners were purposely left off your list.

A. I deny that. I have never purposely left any one off my list.

Q. Have you ever left anybody off your list because you thought he belonged to the working class?

A. No, sir.

Q. Or was a wage earner?

A. No, sir.

Q. Coming back again to the list I referred to a moment ago returnable April 15th, I see the name of Richard Westmoreland, Prudential life insurance agent. Was his name selected because he was or was not a member of a union?

A. I had no knowledge that Mr. Westmoreland was a member of a union.

Q. Or that he was not?

A. Or that he was not.

Q. Did you have any knowledge of whether he was an executive?

A. No, sir, I did not.

Q. Did you have any knowledge of what his viewpoint was?

A. No, sir.

Q. So that he was not selected because he was or was not a member of a union?

A. No, sir.

216 Q. Or because he was or was not a member of the working class?

A. No, sir.

Q. Now, have you ever at any time excluded purposely or otherwise any name because the person—such person—belonged to the working or wage earning class?

A. No, sir.

Q. Did you know any of the jurors whose names were drawn by His Honor to be returned on April 15th, before they came here?

A. Oh, yes; yes, I invariably put many of my friends

in the jury box, people who I know, some of them intimately—some of them personally, and I put them in because—

Q. How many would you say out of 70?

A. Oh, in this jury—in this particular jury here—I believe that I knew three.

Q. Were they put in the box primarily because of their views—particular views on economic subjects or political or religious subjects?

A. No, sir. They were put in the box because I knew them; I knew them to be all good citizens, and I thought perhaps—well, not perhaps—I knew they would be good jurors because good, substantial thinking people.

Q. Now, you knew some in the list besides those who were drawn for this April, 1946, term?

A. Yes, sir.

Q. Did you put any of them—include them among the list of jurors because of their views upon social, economic, religious or political matters?

A. No, sir; I did not consider that at all.

Q. Did you inquire of any of those names you selected in advance of their selection as to what their political, social or religious views might be?

A. No, sir.

Q. Did you know what they were?

A. I did not know.

Q. Then I take it you never selected any juror
217 with relation to his economic status or his social views?

A. No; I didn't consider that at all.

Q. One further matter. You have stated that His Honor, in advance of the jury term, draws a venire or panel.

A. Yes.

Q. Is that made available to counsel shortly after it is drawn?

A. Yes; that is, I mailed a copy of that venire to all counsel who had litigation here in this Court some time prior to the commencement of the trials on April 15th.

Q. Is it available at all times in your office?

A. It is available free of charge immediately after.

Q. Are you or one of your deputies at all times avail-

able to explain any question which may arise with respect to any individual or the group as a whole?

A. Yes, sir.

Mr. Ray: I believe that is all.

Cross Examination (By Mr. Black).

Q. Mr. Ahlstrom, as I understand your testimony you exert an effort to procure a jury which comprises a cross section of the community?

A. Yes, I try to do that, Mr. Black.

Q. And the only jurymen you draw you take from the Polk's directory?

A. No; I said there were other sources. Primarily it is Polk's directory.

Q. To what extent would you say—to what extent are the names selected from Polk's directory—I mean as far as your portion of the state is concerned?

A. As far as I am concerned perhaps half of them.

Q. And in drawing these names—selecting these names you attempt to cross section the community?

A. I have tried to do that, yes.

Q. Do you have any explanation to offer of the fact that in 1944, for instance, you drew—well, in three years out of all the jury panels that were drawn here by you, there were only 11 members of organized labor, that is
218 belonging to organizations who have made affidavits here?

A. Of course in 1944, Mr. Black, I wasn't the clerk of the Court; I was the chief deputy, and I did assist some, of course, in the selection of names.

Q. Evidently hasn't been much change, has there, Mr. Ahlstrom, in the method of selecting jurymen?

A. Yes, there has.

Q. There has been some?

A. Yes.

Q. In 1946 I see you have drawn three that belong to these labor unions.

A. Mr. Black, I have no knowledge whether a man belongs to a union. I look in the city directory and I see a man that works for the Crane Company, or the Utah Power and Light, or even a clerk in a store; I have no knowledge whether that individual is organized labor or not.

Q. We will speak of that for a second, and we will speak of Mr. Brown, an employee of Utah Power and Light. Did you select his name because he was an employee of Utah Power and Light?

A. Yes, I think I did.

Q. Did you know at the time you selected Mr. Brown's name the nature of the position he held at the Utah Power and Light?

A. No, sir, I did not.

Q. Did you know that from the years he worked there he had some kind of executive position?

A. I did not.

Q. You didn't find that out while he was here serving on the jury?

A. No, sir.

Q. Did you know at the time you drew Mr. Brown's name that there were several hundred employes at Utah Power and Light living here in this vicinity who belonged to the International Brotherhood of Electrical Workers?

A. Oh, yes, I did; we have had many employes of Utah Light on our panel.

Q. During the last four years—three years I should say—you have had 11 members of this organization and not one member of the International Brotherhood of Electrical Workers? 219

A. Well, of course I cannot account for—.

Q. Do you know in the years 1944, 1945 and 1946 you had 29 bankers on this list of veniremen? Did you select those bankers?

A. I selected a few of them, yes.

Q. During those three years you had 18 insurance men. Did you select those insurance men?

A. I selected some of them, yes.

Q. During those three years you had 52 merchants. Did you select those 52 merchants?

A. Well I helped select them, because whenever I put in 40 names in the box, Mr. Hampton, the jury commissioner, likewise puts in the same number, so I didn't select all of them.

Q. But you and the jury commissioner both have placed 11 men in this list belonging to organized labor in three

years; during that time you placed 29 bankers, 18 insurance men and 52 merchants?

A. Yes, that is true, what the record shows.

Q. You will readily admit there are perhaps one hundred times more members of organized labor in this state than there are bankers?

A. Oh, yes, that is true.

Q. You would admit there are perhaps several hundred times more members of organized labor than there are insurance men in this state, wouldn't you?

A. Yes, I think that is true.

Q. You would be free to admit that perhaps there are several hundred times more members of organized labor than there are merchants here in this state, wouldn't you?

A. Yes.

Q. Well now, do you still maintain the venire you have drawn here to this case is a cross section of the community?

A. Well, I think it is, Mr. Black. For instance, on this one venire here, in question here, here is a man with Ketchum Lumber Company, Utah Power and Light, two housewives, Utah Fuel, two housewives, apartment house manager, Coal Company, Creamery Company, Auerbach Company, another housewife, ZCMI, Tracy Loan, salesman, Transfer and Storage Company, Bintz Company, Sears-Roebuck Company; here is the manager of Coconut
220 Grove; then it goes down again to a garage, two merchants again; there is a retired man, another garage man, creamery, trucker, another merchant, Bennett Glass and Paint Company, the occupations that have been listed here.

Q. How many men have you got on there that work out in the smelters in Magna?

A. I have none.

Q. How many men have you got there that man the switches, work in the roundhouses down here in these railroad yards?

A. There are none.

Q. How many employees of Utah Copper do you have in that list?

A. None to my knowledge.

Q. How many men have you got on there that work in the mines in Park City or mines in Carbon County?

A. There is none, Mr. Black; because they don't appear on this venire is no indication they are not in the box, however; out of 300 names in the box the Court draws 50—from 50 to 70 at each drawing.

Q. Now, Mr. Ahlstrom, do you say the names were in the box or that they were not?

A. I say there are names of organized labor in the box.

Q. You don't think it is just a matter of chance that the names of 29 bankers came out of the box and 11 members of organized labor, do you? That is not a matter of chance is it?

A. I think it is to a certain extent because at the time this drawing was held, out of the banking population we have here in the state I think perhaps there was not exceeding eight bankers in the box of 300 names, and of course by chance there was I think four or five that were drawn on this particular panel.

Q. I see. So there can be no dispute I refer to bankers as bankers and employes of banks that are listed on this list in that way.

A. Well, employes of banks are sometimes listed as bankers regardless.

Q. Now, Mr. Ahlstrom, you said something about determining whether or not a man would be a good juror in your opinion. Just what do you take into consideration in determining whether a man would be a good juror?

A. Well, there are numerous factors in determin-
221 ing that. I look at the city directory and I see a man that works for some institution; I think that he must be a man of good moral standing and he must be a pretty good man or perhaps that institution wouldn't have him.

Q. In making that determination do you ever try to determine the class of employment or class of service that this man is rendering to his employer? Do you ever take that into consideration?

A. Yes.

Q. And when you do take it into consideration, what do you determine?

A. I usualy put his name in the box.

Q. Do you make any distinction between the man that works with pick and shovel and the man that occupies the top position in the office?

A. Absolutely not, because we have had pick and shovel men in the box.

Q. Well now, Mr. Ahlstrom—

A. That is, not on this panel, Mr. Black, but they have been in there, numerous of them.

Q. My affidavit here covers three years, 1944, 1945 and 1946. Mr. Ahlstrom, when was it that your attention was called to the provisions of Section 48-0-10 of the laws of Utah, 1943?

A. When I became clerk of the Court I decided to have that list in front of me to see what the situation of exemption of a juror was.

Q. This exemption that you have read into the record does not mean a disqualification, does it?

A. No; it means that they have that exemption.

Q. That they can claim it if they desire?

A. Yes, that is my understanding.

Q. You did not mean to indicate that these 14 classes of people were disqualified to serve as jurors?

A. By no means, no.

Q. You understood it was a matter they could claim?

A. Yes.

Q. Supposing you see John Doe's name in the directory, that he is an employee of the Union Pacific, do you determine whether he is an engineer or a fireman before
222 you exclude his name?

A. Well, I don't believe that I have ever put any firemen or engineers in the box because they have that exemption.

Q. Does the Polk directory indicate whether an employee of the Union Pacific is a fireman or engineer, or whether an ordinary employee?

A. Usually they do, yes.

Q. So if he was a brakeman you might leave him in the box; if he was a fireman you might keep him out? Is that right?

A. That is true.

Q. Then you do exercise some matter of choice?

A. On those that have statutory exemptions.

Q. What do you do with the names of men that are mill workers at Magna when you come across those?

A. Some instances they have been in the box.

Q. Well, you are not prepared to point out any instance during the last three years, are you?

A. No, I don't recall any.

Q. What do you do if a man appears as being an employee of the Silver King mine at Park City? What do you do with his name?

A. I have nothing to do with a resident of Park City.

Q. What if it appears to you that there is a truck driver for one of the big truck outfits in the city, what do you do with his name?

A. His name would perhaps be considered and put in the box along with other names.

Q. There are 2000—roughly speaking—2000 members of the Teamsters' Union here in this state over the last three years. How do you account for the fact that not one single member of that large union was ever called on jury service in three years?

A. You had a truck driver on your jury, Mr. Black.

Q. He was a self-employer as you recall—

Mr. Ray: Now, just a moment. He said he drove truck for the Moab Garage as I understood him.

Mr. Black: No, I think if you will look it up—

Q. You haven't seen the affidavit of the Teamsters Union, have you?

A. I have read all of them, yes, sir.

Q. You recall that affidavit shows that there has
223 been a membership there as high as 2000 during these years?

A. Yes.

Q. Not one single member of that union was ever called here to serve on the jury. How do you account for that?

Mr. Ray: That is assuming something. We are not admitting the truth of those affidavits for a minute.

Mr. Black: For the purpose of this motion I assumed that was admitted.

Q. Assuming that the affidavit of Clarence Palmer is true that during the last three years the CIO affiliated unions have had an aggregate membership of 10,000 men a year, how do you account for the fact that during these

three years only six members of that union were ever called on jury service, and three of them were called from Cedar City?

A. I cannot account for it; I cannot account for it.

Q. Mr. Ahlstrom, it is true is it not, that the jury panels you have been selecting are not a cross section of the citizenry of the State of Utah?

The Court: That is assuming what a cross section is. If you mean members of labor unions and churches and so forth, that is one thing.

Mr. Black: That is right. I assume that would be the interpretation, your Honor.

The Court: I think you ought to define your cross section.

Mr. Black: I will withdraw the question and will ask it this way.

Q. If during the last three years a class of people the membership of which is aproximately 32,000 has furnished on these venires only 11 jurymen, and at the same time the bankers of Utah furnished 29, the insurance men of Utah furnished 18, and the merchants of Utah furnished 52, would you say that was a jury that represented fairly all classes of people living in the State of Utah?

The Court: Let me interrupt that by suggesting, as I understand it you say 32,000 men belong to the union, is that right?

Mr. Black: Well, I have the added figures here, your Honor.

The Court: I think that is what was stated.

Mr. Black: Somewhere along there; 1944 was 224 32,000.

The Court: Do you mean all working people belong to the union?

Mr. Black: These affidavits claim a membership of 32,129 during 1944.

The Court: Wouldn't you have to include in your question if you wanted to include the laboring or employed

elements, not only those that belong to the union but those that did not belong to the union?

Mr. Black: I have no way of determining, your Honor, with respect to those who did not. I don't know whether they are listed or identified.

The Court: But they might be in the box just the same although they do not belong to a union.

Mr. Black: My thought is, your Honor, and my contention is to exclude these 32,000—

The Court: If you can show that they exclude anybody because they belong to a union, or belong to the working class, or belong to a church, or anything else, it would be perfectly proper to do it, but it is not right to assume that all the laboring people in the State of Utah belong to the union.

Mr. Black: No; my affidavit clarifies that. I state in my affidavit there are some 90,000 laboring people in the state during those years, and I have brought to the attention of the Court the only ones identified possible for me to bring before the Court, that is these 66 affidavits—

The Court: Your theory is the jury commissioner and the clerk have deliberately excluded union labor?

Mr. Black: I am not going to perhaps call it intentional but the results could not be better if it had been intentional, your Honor. This is my contention here: that to draw what amounts to 11 out of 90,000 could be attributed only to an accident.

The Court: In that connection, do you think that the clerk and the jury commissioner should secure your roll of labor unions?

Mr. Black: I think, your Honor, the rolls of labor unions would be just as helpful and would be just as vital in the promotion of justice as to take all the names from Polk's directory and then select them on the basis of who they work for.

225 The Court: Yes—is that your contention, though,

that that is what constitutes discrimination, that they did not have these rolls?

Mr. Black: My contention is, your Honor, that the work of the clerk and the jury commissioner has accomplished this, and this only, that the members of organized labor of this state have been excluded from jury service during the last three years. I say that admitting there is 11, I say that would be more or less attributable to an accident.

The Court: In other words, affirmatively you think the jury commissioner and the clerk should secure a membership roll of these labor unions?

Mr. Black: Well, it is not for me to suggest how to do it.

The Court: I am asking you that because I am as much interested, and possibly more, than you are.

Mr. Black: Your Honor, I have filed 67 affidavits; seems to me—

The Court: I don't care anything—

Mr. Black: I am just answering your Honor's question.

The Court: Go ahead.

Mr. Black: Those affidavits contain the names and addresses of these labor officers. It would be a simple thing to procure from them the names and addresses and positions of members of organized labor in every community in the State of Utah.

The Court: You think they should do it?

Mr. Black: I think they should do something in order—

The Court: Isn't that what you are contending they should do?

Mr. Black: Yes, your Honor, I do.

The Court: That is what I wanted to get at.

Mr. Black: I think they should make an effort to see that this class of people are represented on these juries.

The Court: I wanted to see what your theory the procedure should be. Go ahead with your examination.

Mr. Black: Thank you, your Honor.

Q. (By Mr. Black) Now then, Mr. Ahlstrom,
226 there cannot be any question about this: that as you examined Polk's directory you exercised some judgment and discretion in determining whether you will put one name in or exclude one name?

A. Oh, well, naturally I cannot. I just don't go down the list and pick; I will just hop around at random in the directory.

Q. When you consider a name you determine in your own mind from the information there contained whether or not you believe that man will make a good juror?

A. Yes.

Q. And acting upon that determination you put the name in the box?

A. Yes.

Q. Mr. Ahlstrom, have you ever at any time while you have been clerk of this Court contacted any executive officer of a labor union to determine whether or not the members of that union would desire to serve on these juries?

A. No, I have not.

Q. Have you ever requested or procured from any officer of a labor union any list of men or women that might be willing to serve on these juries?

A. No, sir, I have not.

Q. Have you ever made any effort whatsoever to see to it that the members of organized labor had a representation on these juries comparable to the representation that you have given to bankers, insurance men and small business men?

A. Well, it perhaps has not been done but it has not been done deliberately.

Q. Mr. Ahlstrom, I am not accusing you of anything that pertains to an intention to discriminate—or to exclude these men from jury service. I am talking now about what has been accomplished. You understand that, don't you?

A. Oh, yes.

Q. Mr. Ahlstrom, I see on this list of jurymen the names of many housewives. How do you determine which housewife shall be excluded?

A. I get that usually from information, Mr. Black
227 —from other information. I have determined oh, friends I might ask to give me the names of one or two housewives, and I get housewives mainly from that type of question.

Q. Does the occupation, employment or official position of the husband of a housewife have anything to do with her selection or rejection as a veniremen?

A. No.

Q. Not a thing?

A. Not a thing, because invariably I don't know the housewives. As I say I have got that from other information, principally from friends; they would give me the names perhaps of one or two housewives.

Q. Now in this Polk's directory that you have been using here in these three larger centers—I refer to Salt Lake and Ogden and Cache County, every year that you have selected jurors, there have been listed the names and addresses of between 15 and 25 thousand members of organized labor, isn't that true?

A. Well, yes, I guess that is true. I don't know for a fact because I don't recall of seeing the name in the directory—the name of John Doe for instance—whether he is A F of L, CIO or what.

Q. I do not claim their labor affiliation is listed but their names are there along with the names of Mr. Brown and Mr. Covey and other business men that have been called on this jury, that is true, isn't it?

A. Oh, yes, indeed that is true.

Q. And those names were there while these other names were selected, that is true, isn't it?

A. Yes, they were there, sure.

Q. And those names were rejected for one cause or another, were they not?

A. They have never been rejected.

Q. They never were called—let's put it that way—were they?

A. Well, they haven't perhaps been put in but it has just been at a hit and miss selection—random selection throughout the directory.

Q. Well now, Mr. Ahlstrom, you aren't going to attribute the calling of 29 bankers, 18 insurance men, 52 merchants just to chance, are you?

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A. Of course I don't put all the bankers in, Mr. Black, and all the merchants in.

Q. They are in the box aren't they?

A. They are in the box and they were drawn.

Q. But you do attribute the fact that these 30,000 members of organized labor were not called—you attribute that fact to chance, is that right?

A. Perhaps, yes.

Q. You say "perhaps." Lets not qualify it.

A. Well, that is rather hard to answer that question the way you put that, Mr. Black.

Q. Well, to what do you attribute the fact that those 30,000 members of organized labor find no representation except as I have indicated on your venires here? To what do you attribute that fact?

A. I didn't know they were not receiving any representation.

Q. But you do not contend that that is not the fact, do you—you do not dispute that is the fact as I have recited it?

A. No.

Mr. Black: That is all, Mr. Ahlstrom. Thank you.

Redirect Examination (By Mr. Ray).

Q. Mr. Ahlstrom, calling attention again to that list of jurors returnable April 15, 1946. Do you know how many of them are wage earners, daily wage earners?

A. No, sir, I do not.

Q. Do you know how many of them work on salaries?

A. Well, might assume perhaps everybody is on salary—most of them.

Q. Some of them may be working for themselves.

A. That is true.

Q. Now, when you put down a merchant, does that mean a man owns a store like Auerbach's, or does it mean he might be a clerk of somebody in Manti?

A. My theory of it is it doesn't always mean that he is perhaps actually the owner of a store.

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Q. Means he is connected with a store, doesn't it?

A. My theory is merchandising—I haven't in all instances put what his specific position is in that store; I have labeled them merchants, employed under the merchandising system.

Q. Suppose a man is a teller or bookkeeper up here at Tracy's—do you list him as a banker?

A. Invariably he has been listed as a banker.

Q. He might belong to the Clerks' Union or he might not?

A. He might; it could very easily happen for all I know.

Q. Mr. Black interrogated you about the Electrical Workers' Union at the Power Company. Do you know of a clerical union up at the Power Company?

A. I understand they have a clerical union.

Q. Do you know whether Mr. Brown belonged to it?

A. I do not.

Mr. Black: I have their affidavit; we can find that out.

Q. (By Mr. Ray) Do you know when Mr. Brown was retired?

A. No, I don't.

Q. And you don't know and never did know what work he did when he was there?

A. No, sir, I didn't.

Q. Now, it appears from the affidavit that Mr. Westmoreland who is on this list belongs to the union. Did you know that?

A. I did not.

Q. Were you concerned about whether he did or not?

A. No; I didn't pick Mr. Westmoreland because he was a union man or non-union man because I didn't know.

Q. You have got him listed on here as Prudential Insurance—Prudential Life Insurance. You didn't inquire whether he belonged to a union, did you?

A. I did not.

Q. Did you ever know he did until Mr. Black's affidavit comes in and shows you he does?

A. I did not.

Q. Did you ever regard, in order to get a cross section of the community, that a workman had to belong or not belong to any organization?

230 A. No, sir, I did not; I didn't ever look at it in that manner.

Q. Take these housewives, do you know whether or not their husbands worked for wages?

A. Very few. I stated before that in most instances I didn't know the housewives, but there are a few of the housewives that I am acquainted with, that I know what their husbands do, naturally.

Q. Well, we had two on this—three on this panel, do you remember—three or four—Mrs. Sabin.

A. Yes, Mrs. Sabin.

Q. She was the wife of a Southern Pacific employee; did you know that when she was *subpoened?*

A. I did not.

Q. You have the wife of a postal clerk here.

A. I knew that because I was acquainted with Mrs. Cahoon.

Q. There was a lady from the north somewhere—

Mr. Black: Mrs. McMurrin.

Q. (By Mr. Ray) Mrs. McMurrin; did you know whether her husband was a wage earner?

A. No; I didn't know Mrs. McMurrin.

Q. You don't know whether 50 per cent or 60 per cent or 90 per cent of all the persons on this April list are wage earners or salaried workers, do you?

A. No, I don't know.

Q. You have listed here a barber from out in Duchesne. Do you know whether he was working for somebody, a member of the Barbers' Union, or whether he ran a little barbershop of his own?

A. No, I do not. Of course that name was put in by Mr. Hampton; that is his jurisdiction.

Mr. Ray: That is all.

The Court: Call the other gentleman.

Mr. Ray: Is Mr. Hampton here?

The Clerk: Yes, Mr. Hampton is here.

W. G. HAMPTON was thereupon called to the witness chair and being first duly sworn, testified as follows:

Direct Examination (By Mr. Ray).

231 Q. Will you state your name please?

A. Let me ask your gentlemen—I am very hard of hearing.

The Court: He is very deaf.

The Witness: I can't catch it.

The Court: You will have to get close.

The Witness: If you can arrange to have me sit some other place, or you get up a little closer.

Mr. Ray: We will get up a little closer.

Q. Will you give your name please?
A. W. G. Hampton.
Q. And where do you reside?
A. 800 East 45th South, Murray.
Q. What is your occupation?
A. Nothing. Retired.
Q. Prior to your retirement what was your occupation?
A. I was with the Consolidated Wagon & Machine Company; I was purchasing agent, when they closed up or abandoned the business.

The Court: Better get in the record that the Clerk is a Democrat, Mr. Hampton is a Republican, to conform with the statute—unless they have changed their politics recently.

Mr. Ray: May the record so show.

Mr. Black: I didn't get his last answer.

(Last answer read by the reporter.)

Q. (By Mr. Ray) Is it true you are a member of the Republican party?
A. Yes, sir.
Q. And Mr. Ahlstrom, you are a member of the Democratic party. Are you the jury commissioner referred to by Mr. Ahlstrom in his testimony?
A. Yes, sir.

Q. How long have you been engaged as jury commissioner?

A. Since January 13, 1927, nearly 20 years.

Q. And so you have performed that service during the last years?

A. Yes, sir.

232 Q. How do you procure names of prospective jurors to add to your list?

A. Well, my territory is mostly farmers and small merchants, stockmen and small merchants—let me go back a little—when I was with the Consolidated Wagon and Machine Company Mr. George Odell was the jury commissioner at that time and when he retired and moved from the State I inherited it, as I usually made up his lists for him to sign his name by me, and I just inherited this job, and we used to get out names from our traveling men and our branch managers and from the salesmen of men we have thought would make good jurymen, regardless of their religious beliefs or political beliefs or whether or not they belonged to a Union or any other association.

Q. In selecting the names for addition to the list do you have some names you know personally?

A. Very few.

Q. Most of them come in to you from connections that the old Consolidated Wagon & Machine Company had?

A. Yes.

Q. Did that firm have connections all through the State?

A. Yes, nearly all over the State they had salesmen, branch managers, and naturally that covered the State pretty thoroughly.

Q. And were there any other sources of names besides those you have just stated?

A. Occasionally I would get some from the newspaper reports of State conventions in Salt Lake, or cattlemen's conventions or horsemen's conventions or something of that kind where they would give a man's name and address, and not knowing them personally I just took their names for granted that they wouldn't be a member of an association or be a delegate to a convention unless they were up and up.

Q. Did you ever select any name because a man did or did not belong to an organization of any kind?

A. No, sir.

Q. Because he was or was not a Republican or Democrat?

A. No, sir.

Q. Or because he was or was not a wage-earner?

A. No, sir.

Q. Or a salaried worker?

A. No, sir.

233 Q. Did you ever have any purpose—or did you ever reject or exclude any name suggested or any name before you because of any such connection?

A. No, sir.

Q. Because of social status?

A. No, sir.

Q. Did you set out with the purpose of getting names of people who did not belong to what we call the poorer class economically?

A. Well, as I say, we got the names from our representatives and most of the people they call on are poor farmers and poor mechanics and anyone who has anything to sell to.

Q. So you have never had in your mind social status?

A. Not a bit.

Q. Or financial status in the selection of a juror?

A. No, sir.

Mr. Ray: I believe that is all—

Q. How long were you employed by the Consolidated Wagon & Machine Company?

A. Since 1902.

Q. And at the time of your retirement you were purchasing agent?

A. Yes, sir.

Q. Working on salary?

A. Working on salary.

Q. And you are living now at Murray and have been for two or three years?

A. Yes, sir.

Q. In retirement?

A. Yes, sir.

Mr. Ray: I believe that is all.

Cross Examination.

By Mr. Black:

Q. Mr. Hampton, if I am not speaking so that you can hear me distinctly I should appreciate having you inform me of that.

A. Okeh so far.

234 Q. Now, as I understand it, you have acted as the commissioner since January of 1927?

A. Yes, sir.

Q. And before that you did the practical work of selecting these names?

A. Yes, sir.

Q. For how many years have you been selecting the names to go in the box?

A. You mean prior to my appointment?

Q. Yes, and during your appointment; all told I want to know.

A. Well, I wouldn't remember; about four or five years while I was making up reports for Mr. Odell, and since January, 1927, I have continued in about the same way. Might say the job pays average around about $35. a year, and out of that comes my postage and time of making up the cards, and so it was more a matter of love than anything else.

Q. Well, I appreciate that, Mr. Hampton. Will you tell me whether or not the methods followed by you in selecting these names have been changed or modified any during the last ten years?

A. No, sir.

Q. You are doing the job now the same as you did 23 or 24 years ago?

A. About the same.

Q. About the same. Will you explain to us in detail just how you go about to select your part of the names that go in the box?

A. Well, I have names come in from the various parts of the country; I enter them up on my records, have little cards made, and then as the Clerk calls for a certain number I bring them in.

Q. From whom do you procure these suggested names?

A. Well, recently—the last two years when I didn't have access to the Con Wagon books, I have been kind of picking

them up through friends and as I say from the convention notices in various papers.

Q. So if the independent grocers would have a convention in Salt Lake you would get some names from the delegates to that convention?

A. Yes.

235 Q. If the Bankers would have a convention you would get names of bankers from that?

A. Yes, sir.

Q. Stockmen have a convention you would get the names of stockmen?

A. Yes.

Q. And so forth?

A. And so forth.

Q. How many names do you usually select to be placed in the box each year?

A. Let me say the box contains 330 or 340 names at all times and whenever the Court makes a drawing the Clerk asks for a refill of some 25 or 30 names which with his 25 or 30 fills up the box to the maximum.

Q. In other words, it is not necessary for you to select 175 names at one time, is it?

A. No, it averages—let me see—since the last six months I have put in about 100 names—in the last six months since January 1st.

Q. Put in about 100 names?

A. Yes.

Q. During that period of time?

A. Yes, just about 100 names up to date.

Q. I see. This year?

A. Yes.

Q. Now, Mr. Hampton, about how many names do you draw from Carbon County in a year?

A. Carbon County?

Q. Yes.

A. Well, I don't know exactly how many in Carbon County; I was going to bring up a list today but it wasn't needed. Now, if you care to look that up that would give you an idea how many comes in and what their occupation is and their address. I couldn't tell where they are. There are some miners and some others on there, machinists,

truckers. Whether or not they belong to any Union I couldn't say.

Q. Well, now, then, were each batch of names—I
236 will state it this way—I suppose there are names of residents of Carbon county placed in the box?

A. I think so, yes.

Q. Rather a large county, Mr. Hampton. I will ask you to state whether or not there is any explanation for the fact that in 1944 there were 3900, in round numbers, members of organized labor residing in Carbon county, and yet not one single name out of that list found its way into the box.

Mr. Ray: Before that question is answered, Your Honor, I want to make it perfectly certain and have the record perfectly clear that I made the contention a while ago in perfect good faith and with the utmost sincerity that this information upon which Mr. Black bases his opinion is not only before this court but this court is entirely without jurisdiction to get it before the court. This affidavit about the number of unions and all of that is not only not properly before this court but this court is void of jurisdiction to get it before it, and I want the record to show that it all comes in under my objection.

The Court: It may be so understood.

Q. (By Mr. Black) Do you have my question in mind, Mr. Hampton?

A. Repeat it, please.

Q. Is there an explanation for the fact that in 1944 there were 3900, in round numbers, members of organized labor in Carbon county, and yet not one single member of organized labor was selected to serve on a jury in this court?

A. No, I cannot explain it. There might be right at this time in that 300 names in the box a number of Union men who haven't been called yet.

Q. Mr. Hampton, is there an explanation for the fact that in 1945 there were approximately 4,000 members of organized labor in Carbon county, and yet not one of those members was drawn to serve on the jury in this court?

A. No, I have nothing to say.

Q. Having in mind the same question, but the facts are a little different—in 1946 there were 4300 members of or-

ganized labor in Carbon county and yet up to date not one member of organized labor from that county has been drawn on the jury—is there any explanation?

237 A. I have nothing to say on that.

Q. In addition to the names that you procure from these Convention delegates and the various conventions and from newspapers from your territory, do you have any other sources from which you procure names?

A. Well, I have friends and acquaintances in a number of places that I ask them for information, ask them to send in a new list.

Q. And I take it, Mr. Hampton, that those names are procured from about the same class of people that you yourself belong to?

A. They might.

Q. Executives—that is, men that have occupied executive positions in industry—

A. I wouldn't know about that.

Q. —and in business.

Mr. Ray: Mr. Black, the evidence doesn't show Mr. Hampton was ever an executive.

Mr. Black: Well, he was purchasing agent. I call that a rather important position with a big company.

Q. Now, Mr. Hampton, you stated that you were interested in procuring good jurors. Do you have any particular standards by which you judge whether or not a man will make a good juror or a poor juror?

A. Well, the juryman selected must have good hearing and be free from mental defects, and whether or not he is—what church he belongs to, that doesn't make any difference. I don't know—they are not selected for that purpose, and it is kind of a hard proposition to give you any information as to what we know about the jurors because I have to pick them up by mail and have to rely on friends living in the communities from where these men are sent.

Q. Well, you say you want jurors that are on the up and up. I am wondering just what you mean by that.

A. What is that again?

Q. You stated in answer to a question addressed to you by Mr. Ray that you were interested in getting men to serve

on the jury who were on the up and up. I am won-
238 dering what you meant by that.

A. Well, they want to be good citizens, American citizens, and high in the community in which they live, and in these country towns where mostly farmers I would imagine a farmer that was progressive would make a better juror for the court than one who is shiftless and a tenant or something of that kind.

Q. The word was "tenant"?

A. Tenant.

Q. Mr. Hampton, would you regard a coal miner working in the mines in Carbon county as being a good juror?

A. Yes, sir.

Q. And he would come within your definition of an up and up man?

A. Yes, sir.

Q. A good juror?

A. Yes, sir.

Q. And still you have no explanation to offer why the coal miners of Carbon county have not been represented on the juries in this court in the last three years, have you?

A. Well, I couldn't say as to that; I couldn't say. I wouldn't know how—some of these places I cannot get the names from.

Q. From what sources do you procure the names that are selected by you as jury commissioner, from Carbon county?

A. From Carbon county at Price.

Q. From what source in Price do you procure the suggested names?

A. The City of Price; isn't it in Carbon county?

Q. Yes, and Helper.

A. Two years ago we had a branch manager there.

Q. The Con Wagon did?

A. Yes, at Price, and through him I would receive names of miners, mechanics, merchants, farmers.

Q. Two years ago?

A. Yes; and since then I haven't had any to speak of.

Mr. Black: I see. Thank you, Mr. Hampton.

Mr. Ray: That is all. I want one further question from Mr. Ahlstrom.

239 V. P. Ahlstrom was thereupon recalled for further direct examination:

Mr. Ray: You might answer from where you are.

The Court: No; let him take the witness stand.

Q. (By Mr. Ray) You were asked, Mr. Ahlstrom, whether you invited any Union leader to send you a list of available jurors, and you said no. Have you asked anybody to send you a list of available jurors, any organization?

A. No, no organization I have not.

Q. Have you asked any business house or any church or any such—any organization whatsoever, to send you a list of prospective jurors?

A. I have not personally. I think that was done by Mr. Wilson once when he asked a Bishop—I don't know what locality it was now—if he would send in four or five names.

Q. But you have never done that, and have never asked the ZCMI or the Power Company or the Utah Copper or the CIO?

A. No, never.

Q. Or the AFL?

A. No, sir.

Mr. Ray: That is all.

Mr. Black: That is all, thanks, Mr. Ahlstrom.

Mr. Ray: Just a minute.

Q. (By Mr. Ray) What was your previous experience before you became Clerk? What has been your background before you became connected with this court?

A. Well, years ago I was an automobile mechanic. After World War I I took advantage of Government training the Government offered at that time and I went to the University of Utah and studied business and finance and commerce.

Q. And following that came to work here as Clerk?

A. Yes, as deputy clerk.

Mr. Ray: That is all.

Mr. Black: That is all, thanks.

240 The Court: Now you can present your motion that you have, if you want to.

Mr. Ray: Who are you speaking to?

The Court: Beg pardon?

Mr. Ray: Who is that addressed to?

The Court: I am talking to Mr. Black. It is his motion.

Mr. Black: Your Honor, our motion is supported by a case that came down after this case was tried—

The Court: I have read that.

Mr. Black: Your Honor knows that?

The Court: I have read that.

Mr. Black: I am sure your Honor knows that.

The Court: Don't spend any time on it.

Mr. Black: There is not any further or better argument that I can make than the opinion in the Thiel case.

The Court: What have you to say about your other grounds for a new trial?

Mr. Black: Mr. Roberts will discuss that. I just desire to say this in connection with these affidavits that I think it appears from these affidavits that the right of trial by jury as protected by the Thiel case was not awarded to these children in this case.

It may be Your Honor might feel these affidavits are untimely, that the motion for new trial should have been made more complete and full at the time it was made. It may be that the court will feel that the jury should have been challenged before the trial was started. I cannot change the record on that, but I say to the court now it does appear from these affidavits, from the showing made here at this time, that these three small boys who were denied right of recovery by this jury did not receive the kind of trial that is guaranteed to them by the Constitution of this country, and I say to Your Honor now, as I have many times before, that a jury had to belong to a certain class to return into this court with a verdict that denied these three children

any recovery at all, and at the same time handed to your Honor a verdict fining one of their number two pounds of butter because he was a few minutes late—that jury was not mindful of its duty and was not mindful of the
241 equities and justice of this case, and I appeal only here now to the inherent power of this court to correct an apparent, manifest miscarriage of justice and award these three children a trial they are entitled to, a trial by a jury in which they find some representation, a jury that is taken from the class of people which their daddy belonged to at the time of his death, a jury that could understand what it means to be denied the support and loving home they were entitled to that they lost on that morning at Bagley, Utah.

I have nothing more to say. I would like to have Mr. Roberts present his thoughts on the other two matters we deem of vital importance in this motion for a new trial.

Mr. Roberts: Your Honor, there was one question during the course of the trial which was asked of Dr. Ogilvie which was objected to by us, which I think was very important and had a great deal of bearing upon the result which the jury returned. He was asked the question—it was a hypothetical question, of course—he was asked to take into consideration all the findings in the autopsy which were introduced as an exhibit in the case. He was asked to have in mind an engineer of—I think it was—30 years experience, or whatever it was; that this engineer had a duty under the rules to respond to a call by the fellow who was working with him in the cab, and that he made this; that the fellow who was with him in the cab made the call of the signal to which this man was under duty to respond, and he did not respond.

Now, from these facts the question went: Can you tell us in your opinion when this man died—it was probably put this way—was he dead at the time that the call was made to him and he didn't respond? And the answer was: Yes, in my opinion he was.

Now it is our contention—it was our contention then and it is our contention now that to put into that question those added things about here is a fellow, an engineer of 30 years experience, who was supposed to respond under the rule

and did not, do you think he was dead at that time—in other words, they hadn't any more relation to medical testimony, medical foundation, than anything I could imagine in the world. In other words, if the question were limited to these medical findings there couldn't be any objection to
242 the question, but it takes in things—facts—which make the question absolutely speculative. In other words, any juror—any person in the court room—anybody could answer that question as well as the doctor. That he was a doctor doesn't give him any right to determine whether or not the engineer was dead if he didn't respond when it was his duty to respond. Those facts were in the question, Your Honor, and it seems to me that that was one of the very vital things in this case, and it being vital, as it was—to admit the testimony of a man of the recognized ability and reputation of Dr. Ogilvie, when the hypothetical question had so many speculative things in it and things which had no relation to medical knowledge or education, and he gave that answer, it seems to me that error was sufficiently vital to affect that verdict, and that a new trial on that alone could be granted.

There was one other matter, of course, in connection with that Rule 51, and particularly the last sentence: Opportunity shall be given to make the objections out of the hearing of the jury—and that is in connection with the objections to the instructions—the jury was sitting here and the Court called upon counsel to make any exception, rather than have them go out. Of course, counsel for the defendant made no exceptions. We wanted to protect our record in connection with this matter of the offer of passes, and of course we took these exceptions in the presence of the jury.

I think the taxing of exceptions in the presence of the jury indicates to them that the Court, of course, has ruled against counsel, and, of course, I felt at the time we had to make it right then or waive the chances on our record, and so we did it, and of course I don't think we were afforded an opportunity of making those exceptions in the absence of the jury under that rule.

Mr. Ray: Your Honor will remember no request was made by counsel for any opportunity to take exceptions in

the absence of the jury, and he had already taken the same exception two weeks before and saved the point on the question of the pass.

Now, Your Honor will remember that Mr. Black opened—made his opening statement—and he started out by identifying the engineer as a man with 30 years experience as engineer; then he proved that fact; he then put evidence on to show that it was the duty of the engineer not to run past that red block; it was proven without any dis-
243 pute that the engineer was dead at the time of the collision; there was no proof offered to the contrary. So there was a dead man sitting in the cab at the time of the collision. The witness Dr. Ogilvie testified he could not tell from the autopsy report alone when the man died; you could determine that only by the relationship between the pathology and his conduct; if the conduct departed from the normal, that gave a clue as to whether death had occurred at a particular time. Now, he didn't say the man was dead at that time but he said if that man for 30 years had been running on the railroad and he understood that rule and he was known to be dead a half a minute or less after he passed that block and he gave no response to the fireman, it would be his opinion he was overcome—he was either dead or incapacitated at that time—30 seconds earlier. Now, the objection was that it didn't include all the facts. Your Honor asked him if it included enough; counsel examined him on his voir dire and then on cross examination counsel picked him up and asked him for his opinion with respect—asked him what his opinion would be if his conduct had been so and so and so and so—if he had put on air brakes—would you think he was dead then? And the doctor said: No, I wouldn't.

If your Honor wants to hear it I can read you an opinion of your own Circuit which seems to be very pertinent to that subject.

The Court: What is it?

Mr. Ray: This is a case twice decided by the Circuit Court of Appeals, opinion written, one by Judge McDermot, the other by Judge Bratton. It is the case of New York

Life Insurance Company against Doerksen, 64 Federal (2nd) 240.

In that case the Court says:

(Reads) "An autopsy disclosed arteriosclerosis and enlargement of the heart. The walls of the left coronary artery were hardened and thickened. Medical experts for the Insurance Company testified that the opening in this artery was only from one-fourth to one-fifth of its normal size. An enlarged photograph of a cross-section of the heart and the opening in the left coronary artery clearly supported this testimony. Medical experts for the plaintiff testified that the opening in this artery was approximately one-half
of its normal size. The walls of the left ventricle
244 were thickened. The muscle in the apex of the left ventricle had ceased functioning and had been replaced by fibrous tissue. The wounds over the eyes were superficial. There was no injury to the periosteum of the skull underneath them. An examination of the brain failed to disclose any injury to the brain tissue.

"Medical experts for the plaintiff, over objection of the Insurance Company, testified that in their opinion the death of the insured had resulted from concussion of the brain caused by the blows on the head. Medical experts for the Insurance Company testified that the opening in this artery was approximately one-half of its normal size. The walls of the left ventricle were thickened. The muscle in the apex of the left ventricle had ceased functioning and had been replaced by fibrous tissue. The wounds over the eyes were superficial. There was no injury to the periosteum of the skull underneath them. An examination of the brain failed to disclose any injury to the brain tissue.

"Medical experts for the plaintiff, over objection of the Insurance Company, testified that in their opinion the death of the insured had resulted from concussion of the brain caused by the blows on the head. Medical experts for the Insurance Company testified that in their opinion the death of insured had been caused by a heart attack due to the failure of the coronary artery to supply sufficient blood to the left ventricle.

"At the close of the evidence the Insurance Company moved for a directed verdict in its favor. This motion was overruled. There was a verdict and judgment for the plaintiff. Thereafter, the court added attorney's fees and costs to the judgment. The Insurance Company has appealed.

"Where the matter under inquiry is one on which certain persons by reason of training, observation, or experience possess expert knowledge which will be of aid to the jury in reaching a correct solution of the issues and is therefore properly the subject of expert testimony, it is no objection that the opinion elicited from the expert is on an issue or point to be decided by the jury. (Citing cases.)

"A medical expert, after stating the facts, or assuming the facts, upon which his opinion is founded, in case the question is hypothetical, may give his opinion as to the cause of death. (Citing cases.) We are of the opinion that the court did not err in admitting the testimony of plaintiff's experts as to the cause of death."

245 In the second opinion the Court says—the second opinion if the Court please, is to be found in 75 Federal (2nd). Reads:

"The error assigned to the form of hypothetical questions propounded physicians is without merit. A hypothetical question should incorporate facts supported by evidence, but need not include all the facts in evidence nor facts or theories advanced by the adversary. If the adversary desires the opinion of the expert upon the facts as he asserts them to be, he can obtain it on cross-examination. To the end that expert opinion evidence may aid the jury and not mislead or confuse them, the form and length of a hypothetical question must be left largely to the discretion of the trial court. A hypothetical question which distorts instead of reflecting the evidence should not be permitted. (Citing cases.) The questions here propounded were fairly put and fairly answered."

That is exactly what happened to us. You said: You can examine him; you can ask him on your theory. We asked him the question upon the facts as we thought they were established, and then Mr. Black and Mr. Roberts asked him

for his opinion on the facts as they thought they were established.

Now, on this other matter, if the Court please, I do not know whether your Honor wants to hear me on that or not—the question of this jury.

The Court: Well, yes, you are representing the profession here, as Mr. Black is, and I would like to know what method you think, as amicus curiae, ought to be followed in getting a jury.

Mr. Ray: Well, I cannot make any reference to the facts in this case without coming back to the proposition that the law is perfectly well settled they are not before your Honor and cannot be.

The Court: Assuming they were, because if anything is wrong about the system and method we ought to get it right.

Mr. Ray: In the first place there is nothing about your Honor's method of selecting juries that has not been out on the table so I could come down here and find it out any time I wanted to. I can come down any time, as the witness stated, and get a list of jurors and find out who they
246 are and who they work for. If I want to know whether they belong to the Union I can find it out, but it has never been thought that I can gamble—I can find out something about the jury and take my chances and if I like the verdict, okeh; if I don't, then I squawk. It has always been understood if I have got something to kick about that jury, I say so in advance.

Now, who did we have on this jury? *Lets* just take a look. Some of these jurors said they knew Mr. Black and Mr. Rawlings. But who did we have? Parley N. Winn works in a feed store. If he is owner of the store, if he is a capitalist, Mr. Black could have found it out. He didn't ask him. All we got out of that man was he works in a feed store up in Smithfield.

Mr. Black: Mr. Ray, may I interrupt you? Didn't even get that out of him before this court. His Honor doesn't permit these veniremen to be examined as to their occupation.

Mr. Ray: They told his Honor what they were, what their occupations were. That is the only place I got it at, right here in court.

Here is Jones, a refrigeration man in Bountiful, repairs refrigerators. Does he belong to the machinists' union or doesn't he? I don't know. Is he a wage earner or isn't he? Certainly looked like a working man.

Mr. Black: He didn't act like one.

Mr. Ray: Percy B. Wright. He worked for Bennett Glass and Paint Company; in what capacity I don't know. He may be a stockholder or may not, but no effort was made to find out beyond the fact he worked for Bennett Glass & Paint.

Earl House, salesman in Tooele. What does he sell? How much does he make? What is his background? He sat in this court room and said he knew Mr. Black.

Mr. Black: Who is that?

Mr. Ray: House.

Mr. Black: I never saw him in my life; never had acquaintance with him up to the time I unfortunately met him on this jury.

Mr. Ray: He may be wrong; maybe he didn't know you but that is the statement he made. I didn't excuse him on that account.

Leonardson, a grocer up in Davis County.

Jack Pogue, truck driver.

247 Mrs. McMurrin, housewife. She had heard of Mr. Black; of course, everybody has; but he didn't inquire as to whether she belonged to the Union or whether she didn't.

Theron Covey; runs a dance hall. If you have got a lot of minor children you might regard that as a bad occupation for a man to follow, but no criticism made of it at the time.

Here is Vesta Cahoon; her husband is a postal clerk.

Carl Huhl; worked for the ZCMI; now working in a garage in Logan.

Bennett runs a coal office in Salt Lake.

Maybe that is not a mine-run jury, but I want to tell you I thought it was after I got it; I thought it was a mine-run jury, and Mr. Black thought it was a very good jury until the verdict came in. And in his argument here made today he says it wasn't a good jury; and if I may take the liberty of interpreting his reason for saying it wasn't a good jury, it was because it refused to violate its oath. It took an oath to decide this case on the facts, not because orphans were involved. It was under oath to find as it did if it believed that engineer was dead when those things occurred.

We addressed to Your Honor a motion for a directed verdict which we thought we were entitled to, which we thought we would get, which we did not get but which we still think we were entitled to, because there was not any evidence in this record on which a jury could find that that man consciously and wilfully ran past those lights.

Now, personally, as long as I have three challenges, or whatever the challenges may be, I do not think as long as you have 12 men or 12 men and women and allow each side three challenges, that I am going to be hurt if Mr. Ahlstrom calls up Mr. Palmer and says: Send me some jurors—I don't think I am going to be hurt. I don't think a railroad man is going to find against me on the proposition that that man was dead when he unfortunately went past that red light, and neither does Mr. Black, because there was the wife of a railroad man and he didn't want her on the jury.

Mr. Black: Didn't want her? I would love to have her on here.

Mr. Ray: Didn't His Honor ask you if you wanted to challenge her for cause?

Mr. Black: No, he did not, and we didn't challenge her for cause. I should like to have 12 engineers to try that case, I tell you that.

Mr. Ray: I wouldn't be afraid of the engineers, in that case.

Mr. Black: And let you pick them out from the Southern Pacific, too.

Mr. Ray: I wouldn't be afraid of that.

Now, Mr. Black had his Brotherhood of Railway Trainmen; he had his witnesses here; he brought them all from organized labor, and they all testified, and when they got through and shook it down, they all testified that man was dead. In the beginning, though—in the beginning they speculated as to whether he had consciously manipulated those brakes, but before they left the witness stand on cross examination there was not an atom of that left.

Now, you look through this list and we hear of so many bankers, somebody identified with the San Pete Valley Bank, somebody identified with the Tracy Loan & Trust—in what capacity it does not appear. I found out for myself that one of them was a teller at Tracy Loan & Trust. What capacity the other man who was identified with the San Pete Valley Bank I don't know to this day. But we had barbers, truck drivers, repairmen, salesmen, and as far as the evidence shows 90 per cent of these people come from the lower economic classes in this State.

Now, it should not make any difference at all whether a workman belongs or does not belong to a Union. Certainly I would agree it should not exclude a man from his right to vote, whether on election day or any other time, the fact he does belong to a Union or he does not belong to a Union; but there is no proof in this case that brings us within the Thiele case of the Southern Pacific, none whatsoever, and I have brought here rather a long list of cases to support my contention, first, that this matter is not properly before Your Honor, and, second, that they cannot raise it at this time. If Your Honor would like to hear them I have them ready.

The Court: No, I do not care to hear them.

Mr. Black: For the record I would like to be heard just for a short time. I know it is imposing on the time of the court but I would like to be heard nevertheless.

The Court: Go ahead.

Mr. Black: Usually, Your Honor, I agree with everything Mr. Ray says. I have been one of these lawyers around this town that has been agreeing with him
249 ever since I came to the Bar, but I have reached the point today where I cannot agree with what he says in several respects and I intend, with the court's permission, to have my say on those matters.

First I want to call your Honor's attention to the 16th paragraph of the original motion for a new trial: "The Court ought to grant a new trial in the exercise of its inherent power to prevent injustice and to secure to all litigants a fair and impartial trial."

I am satisfied, Your Honor, that these affidavits and this showing we have made today is proof that we did not have the kind of trial that we are entitled to under the Supreme Court decision of the United States. (Reads):

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." Citing many cases.

That is the principle the Thiele case was decided upon. We have revealed to this court and demonstrated here that at least 30,000 citizens of this State who apparently are qualified for jury service have been excluded from the panels, and from the panel that tried these cases: That, your Honor, we offer to this court in support of the proposition that we did not receive a fair trial.

Now, I want to talk about the suggestion Mr. Ray stated to this Court that the oath this jury took required them to return with the verdict that they did. I say to Your Honor at this time that that very verdict itself is the strongest witness that we have that there was a miscarriage of justice in this court and in this trial. I say to this court that the evidence was absolutely undisputed, even by Mr. Ray, that the first red block was passed while yet the engineer was alive. I say as he approached that red block and as he passed that red block his duties—the rules required him to take some definite action to bring that train to a stop. The proof is here without contradiction that he failed to take

such action, that as the train was proceeding after the first red block was passed there was an application of air; that that is supported by the testimony of the fireman.

Now, Your Honor, there cannot be any question about that. Now, there cannot be any question of doubt in the world but what as the second red block was passed
250 that the second red block was visible. I say the testimony of four witnesses is before this court uncontradicted, except by the fact revealing that the engineer was dead at the moment of collision. I say the testimony of Clarence Russell, of Altman, of Jimmy Welsh, of Cook shows and demonstrates beyond any question of doubt that the air-brakes on that train were applied after that second red block was passed.

Mr. Ray says that I will admit that is not true. I say to the court I believe this as certainly as I believe I am speaking to your Honor.

Lets see if that testimony was destroyed. Those witnesses all testified, and there was no contradiction in Si Welsh's testimony, that there is not any similarity between the shock that comes from the application of air and the shock that comes on impact. Those men testified, every one of them with the same voice, that after that air was applied there was 12 or *12* seconds elapsed while yet the train moved forward before the shock that knocked these men down.

Mr. Ray relies upon that cross examination that Jimmy Welch said, and the other boys said, or heard maybe, that the impact could have set the air. That was the rankest kind of speculation. I know Your Honor follows me when I recite these facts: here was a steel train, an inch or two of play—an inch or two less every seven feet in the whole train; steel coupler in steel coupler. When that train went into impact with that first 21 there was never any 11 or 12 seconds of uninterrupted movement where men could stand on their feet with coffee in their hand and ride it out. When those trains went into collision there was not a second or instant of time when there wasn't a shock that traversed that train from end to end. That was the shock that knocked Russell down; that was the shock that knocked Jimmy Welsh forward in his seat, that knocked Clarence Russell

the full distance of the train, that knocked Dan Altman down.

Now, clearly, when Mr. Ray says there was not any question of doubt about the fact that this engineer was dead when he passed that second red block, I say the competent evidence, the persuasive evidence was that he was alive when he passed that second block. But our case is made, your Honor, that the undisputed proof is that he
251 passed the first red block and took no affirmative action to bring that train to a stop. That was the standard of care. That was the requirement of the red block. That was the command that he failed to respond to, and his failure to respond to that command cost the lives of fifty people and serious injury to more than 85 others.

I say to Mr. Ray again so there cannot be any misunderstanding of my point here, that the competent evidence, the evidence that should persuade, any jury that was willing to accept it in a spirit of fairness would have found these facts as I have recited them, and the fact they did not, the fact they were evidently as greatly interested in the little, simple fine they made, indicates that jury had forgotten its duty, forgotten the oath it had taken, and was willing to return a verdict the injustice of which is staggering to me. It may not be to Mr. Ray and others but how a jury in the face of these facts could ever return a verdict of that kind just brings to me this one message: it was a miscarriage of justice; it was a jury that was not willing to follow its oath or to do justice between these parties.

I say under that 16th paragraph of our motion for a new trial and the showing we have made, the Court should in the exercise of its discretion grant this new trial.

The Court: This case was submitted on the theory that the engineer was guilty of wanton, wilful, intentional misconduct. It was submitted to the jury upon that charge in the complaint, and not upon the question of ordinary negligence.

I think the case should have gone to the jury on the question of wantonness and wilfullness. Therefore, on all the grounds alleged, I will deny your motion for a new trial.

Foregoing Narrative Statement of Proceedings Had at the Presentation of Plaintiffs' Motion for a New Trial, June 21, 1946, filed in U. S. District September 30, 1946.

Certificate of Clerk.

United States of America, District of Utah.

262 I, V. P. Ahlstrom, Clerk of the United States District Court for the District of Utah, *to* hereby certify that the foregoing pages numbered from 1 to 261 contain a full and correct copy of the original record and proceedings as requested in plaintiffs' designation in the cause numbered 906, Civil, wherein Jackie Packer Francis, et al. are plaintiffs and Southern Pacific Company, a corporation, is defendant, now remaining among the records of the said court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid court at Salt Lake City, Utah, this 21st day of October, A. D. 1946, and the 171st year of the Independence of the United States of America.

(Seal) V. P. AHLSTROM, Clerk.

Filed October 28, 1946. Robert B. Cartwright, Clerk.

And thereafter the following proceedings were had in said cause in the Unietd States Circuit Court of Appeals for the Tenth Circuit:

Record Entry: Cause Argued and Submitted.

First Day, May Term, Monday, May 19th, A. D. 1947. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard and was argued by counsel, Parnell Black, Esquire, appearing for appellants, Paul H. Ray, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

Opinion

[July 9, 1947]

Parnell Black (B. E. Roberts, Calvin W. Rawlings, H. E. Wallace, and Wayne L. Black were with him on the brief) for Appellants.

Paul H. Ray (S. J. Quinney, Grant C. Aadnesen, and Ray, Quinney & Nebeker were with him on the brief) for Appellee.

Before BRATTON, HUXMAN and MURRAH, Circuit Judges.

BRATTON, Circuit Judge:

Jack R. Francis and Delphia Packer Francis were husband and wife; and they were the parents of three children, all minors. Southern Pacific Company is a railway company. On the day in question, the westbound passenger train No. 21 of the company was operated in two sections. Francis and his wife were passengers on the first section. They boarded the train at Ogden, Utah, were en route to Carlin, Nevada, and occupied a berth in the rear car of the train. Francis was an employee of the company; and he and his wife were each using a pass issued by the company which contained a provision that in its use the user assumed all risk of injury to person or property whether by negligence or otherwise, and absolved the company from any liability therefor. The two sections of the train left Ogden approximately twelve minutes apart. A freight

train ahead of the first section of the passenger train encountered difficulty at a point about eighteen miles west of Ogden. On that account, the first section of the passenger train was compelled to stop, and it then moved forward slowly and cautiously. The second section crashed into the first section, and Francis and his wife were killed. The minor children of the deceased parents, acting through their general guardians, brought two actions against the company to recover damages, one based upon the death of their father and the other upon the death of their mother. The complaint in each case was in two counts. The first count charged failure to use ordinary care in the operation of the second section of the passenger train, and the second count charged wanton misconduct in the operation of the train. The company denied negligence and misconduct in the operation of the train, and pleaded in defense the provision of the pass absolving the company from liability. The two causes were consolidated for trial. The court submitted both cases to the jury on the issue whether the engineer of the second section was guilty of wanton misconduct in the operation of the train as charged in the second count of the complaint. Verdicts were returned for the company, judgments were entered accordingly, separate appeals were perfected, and the case involving the death of the father of the minor children is presently before us for determination.

Error is predicated upon the refusal of the court to submit to the jury the issue of ordinary negligence in the operation of the train as charged in the first count in the complaint. The argument is that the action is founded upon the law of Utah; that the action is independent of any right of action the father of the minors may have had; and that the conditions of the pass upon which their father was riding on the train do not abrogate or cut off their right of action. Article XVI, section 5, of the Constitution of Utah, provides in substance that the right of action to recover damages for injuries resulting in death shall never be abrogated; and with an exception which does not have any bearing here, section 104-3-11, Utah Code Ann. 1943, provides in presently material part that when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his per-

sonal representative for the benefit of his heirs, may maintain an action for damages against the person causing the death, and that such damages may be given as under all the circumstances of the case shall be just. The statute does not provide for the survival of a right of action. Neither does it transfer a right of action from the decedent to his heirs. It creates a new right of action in the heirs which did not exist at common law. It is an action which arises on the death of the decedent. And it is separate and distinct from any action which the decedent might have maintained for personal injuries had he survived the accident. Mason v. Union Pacific Railway Co., 7 Utah 77, 24 Pac. 796; Halling v. Industrial Commission, 71 Utah 112, 263 Pac. 78; Morrison v. Perry, 104 Utah 151, 140 Pac. (2d) 772. But, even though it is a separate and distinct action which arises on the death of the decedent, the foundation of the right of action is the original wrongful injury to the decedent. And it is essential to the maintenance of the action that the wrongful act or default be of such character that the decedent could have maintained an action to recover damages for his injury if death had not ensued. While it is not a derivative action in the ordinary meaning of the term, recovery cannot be had unless the decedent could have recovered damages for his wrongful injury if he had survived. Northern Pacific Railway Co. v. Adams, 192 U. S. 440; Michigan Central Railroad Co. v. Vreeland, 227 U. S. 59; Mellon v. Goodyear, 277 U. S. 335; Flynn v. New York, New Haven & Hartford Railroad Co., 283 U. S. 53.

At the time of the fatal accident, the father of the plaintiffs was using the pass issued to him in transportation in interstate commerce. The pass had been issued under the provisions of the Hepburn Act, as amended, 49 U. S. C. A. §1. The force and effect of a condition attached to such a pass absolving the company from liability for injuries to person or property is not governed by the law of the state in which personal injury or death occurred. It is governed by federal law. Northern Pacific Railway Co. v. Adams, supra; Kansas City Southern Railway Co. v. Van Zant, 260 U. S. 459. And where the holder of a pass containing a provision of that kind uses it for transportation in inter-

state commerce as a passenger on the train of the company issuing the pass and is killed while en route as the result of an accident, the company is not liable to the surviving heirs of the deceased under a state statute such as section 104-3-11, supra, for damages proximately caused by ordinary negligence in the operation of the train. Northern Pacific Railway Co. v. Adams, supra. Therefore the court was correct in declining to submit to the jury the issue of ordinary negligence in the operation of the second section of the train, as charged in the first count of the complaint.

It is urged that the court erroneously admitted in evidence certain testimony given by a pathologist. One question of fact contested with vigor at the trial was whether the engineer in charge of the engine on the second section of the train, in wanton disregard of the consequences reasonably to be expected, passed two overlapping stop signals as he approached the point of the crash, or whether he died suddenly of coronary occlusion or advanced coronary arteriosclerosis before passing the second signal. In support of its contention that the engineer died of one or the other of such natural causes before passing the last stop signal, the company called as a witness a pathologist whose qualifications as an expert in that field are not challenged. The witness had performed about three thousand autopsies; and he was familiar with the usual autopsy reports, their terms and meanings. He examined the report of an autopsy made upon the body of the engineer and testified at length, much of his testimony being based upon the report. And as an expert he expressed the opinion that cause of death was advanced coronary arteriosclerosis. In reaching that conclusion he took into consideration among other things the condition of the heart and the condition of the skin, emphasizing that live skin and dead skin would have reacted differently to the steam which poured into the cab of the engine immediately after the accident. After the witness had pointed out certain factors inhering in the equation, and after he had expressed the view that the cause of death was advanced coronary ateriosclerosis, a hypothetical question was propounded to him. The question was in conventional form and assumed with substantial accuracy a resume of most if not all of the pertinent

physical facts and circumstances existing immediately prior to the collision, and afterwards, particularly the condition of the heart, the position of the body in the cab of the engine, and the condition of the skin on the body. With those facts hypothesized, the witness was asked whether in his opinion as an expert death or disability of the engineer had occurred at the time he failed to respond to the last stop signal before the accident. The witness answered that on the basis of the facts assumed in the question, it was his impression that the engineer would have responded normally had he been mentally competent at the time the red signal was seen. An objection was interposed to the question on the grounds that any conclusion to be arrived at from the facts assumed did not have anything to do with pathology, and that it called for the opinion of the witness on the matter to be determined by the jury and for that reason invaded the province of the jury. No motion was made to strike the answer on the ground that it was not responsive to the question or otherwise. The opinion of a witness qualifying as an expert is not admissible in evidence where the question for determination by the jury depends entirely on common knowledge and common understanding, and no special training or experience is required for its correct decision. In a case of that kind the jury is equally competent with the expert to weigh and appraise the evidence and to draw conclusions from it, and therefore expert testimony should be excluded. Milwaukee & St. Paul Railway Co. v. Kellogg, 94 U. S. 469; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551; Kenney v. Washington Properties, Inc., 128 F. (2d) 612; Henkel v. Varner, 138 F. (2d) 934; Lee v. Salt Lake City, 30 Utah 35, 83 Pac. 562; Musgrave v. Studebaker Bros. Co., 48 Utah 410, 160 Pac. 117.

But in a wide range of cases where the matter under inquiry is one with which the lay or uneducated mind is unfamiliar, expert testimony is admissible as an aid to the jury in reaching a correct solution of the controverted issue or issues. And where the inquiry involves a matter on which a witness by reason of his training, observation, and experience possesses expert knowledge which may be of aid to the jury in arriving at a correct solution of the

issue or issues, it is not a well-grounded objection that the opinion elicited from the expert relates to the issue to be resolved by the jury. United States Smelting Co. v. Parry, 166 F. 407; New York Life Insurance Co. v. Doerksen, 64 F. (2d) 240.

The condition of the heart of the engineer as disclosed by the report of the autopsy was a matter peculiarly in the field of a scientific pathologist in its relation to the cause of the death, and likewise the condition of the skin as disclosed by the report in its reaction to the escaping steam immediately after the crash was a matter peculiarly in the field of a skilled pathologist. One had direct and material bearing upon the cause of death and the other direct and material bearing upon the time of death, whether before the accident or otherwise. It was by bringing into appropriate relation the pathological conditions and the physical facts and circumstances existing immediately before and after the fatal accident that the pathologist was enabled to form and express an opinion as an expert concerning the cause of death and the time of death or disability with respect to the time the train passed the signal immediately before the accident. Viewed in the light of all the pertinent facts and circumstances developed at the trial, the expert opinion of the pathologist was admissible as a means of aiding the jury in resolving the issue immediately in controversy. Cf. New York Life Insurance Co. v. Doerksen, supra.

The remaining contention calling for consideration is whether the denial of the amended motion for new trial constituted reversible error. One ground of the original motion and of the amended motion was the insufficiency of the evidence to justify the verdict. Another ground was that the verdict was against the weight of the evidence. It is argued that the court abused its discretion in denying the amended motion because it appears that the verdict returned was against the overwhelming weight of the evidence, and that under the evidence the jury should have returned a verdict for plaintiffs. But it is settled law that the denial of a motion for new trial is not open to review for error of fact. Fairmont Glass Works v. Cub Fork Coal

Co., 287 U. S. 474; United States v. Socony-Vacuum Oil Co., 310 U. S. 150.

As an additional ground for new trial, raised for the first time in the amended motion filed more than forty days after entry of the judgment, was that in selecting the jury panel from which the jury was chosen to try the case mostly business executives or those having the employers' viewpoint were purposely selected; that wage earners and persons of working classes were purposely left off such panel; and that as the result of that method of selecting the panel, plaintiffs were denied a fair trial before a fair and impartial jury. The affidavit of one of the attorneys for plaintiffs was attached to the amended motion at the time of its filing. Five days later additional motions were filed in the case, intended to support the motion. And at the hearing on the motion, the clerk of the court and the jury commissioner testified at length respecting the method used in selecting the names placed upon the jury panel. Trial by jury as firmly rooted in our jurisprudence contemplates an impartial jury drawn from a cross-section of the community. And while it is not necessary that every jury shall include representatives of all economic, social, racial, political, or geographical groups of the community, the stamp of approval cannot be placed upon a system for the selection of the panel of prospective jurors through which members of any of these groups are intentionally excluded. Distinctions and discriminations of that kind among such groups must be avoided. Otherwise, trial by a fair and impartial jury within the contemplation of law is denied. Thiel v. Southern Pacific Co., 328 U. S. 217; Cf. Ballard v. United States, 329 U. S. 187. But subdivision (b) of Rule of Civil Procedure 59, 28 U. S. C. A. following section 723, provides that a motion for new trial shall be served not later than ten days after entry of the judgment, except that such a motion based upon the ground of newly discovered evidence may be made after that time and before the expiration of the time for appeal, with leave of court on notice and hearing, and on a showing of due diligence; and subdivision (c) provides that when the motion is based upon affidavits they shall be served with the motion. It is manifest that the amended motion for new trial, insofar as it sought to raise for the first time the question

whether the jury panel had been improperly selected, was not filed within the time specified in the rule. It came too late. Moreover, ordinarily the granting or the denial of a motion for new trial rests largely in the sound judicial discretion of the trial court, and its action thereon will not be disturbed on appeal except in case of plain abuse of discretion. Long v. United States, 139 F. (2d) 652; Gerson v. Anderson-Prichard Production Corp., 149 F. (2d) 444. Taking into consideration the affidavits, the testimony of the clerk and the jury commissioner, and the other relevant facts and circumstances, we find ourselves unable to say that the court abused its discretion in the denial of the amended motion for new trial.

The judgment is AFFIRMED.

Judgment.

Twenty-fourth Day, May Term, Wednesday, July 9th, A. D. 1947. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

An order was entered July 25, 1947, extending the time for appellants' petition for rehearing to August 11, 1947.

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Petition for Rehearing

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 3424

JACKIE PACKER FRANCIS, a minor, DENNIS RAY FRANCIS, a minor, and JAMES BRENT FRANCIS, a minor, by and through their general guardians, RAY E. FRANCIS and VIRGIL O. PACKER,

Appellants,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Appellee.

To the Honorable, the United States Circuit Court of Appeals for the Tenth Circuit:

Comes now Jackie Packer Francis, a minor, Dennis Ray Francis, a minor, and James Brent Francis, a minor, by and through their general guardians, Ray E. Francis and Virgil O. Packer, appellants in the above-entitled cause,

and respectfully petition the Court for a rehearing herein on the following grounds:

1. The decision of this Court herein is contrary to law.

2. The Court erred in holding that under the Statutes and Constitution of Utah and decisions of its highest court, interpreting and construing the same it is essential to the maintenance of this action that the wrongful act or default of the appellee be of such character that decedent, Jack R. Francis, could have maintained an action to recover damages for his injuries if death had not ensued, such holding being contrary to the provisions of the Constitution and Statutes of the State of Utah, and contrary to the interpretation and construction placed thereon by the Supreme Court of the State of Utah.

3. The Court erred in holding that the Hepburn Act governs the force and effect of the condition attached to the pass absolving appellee from liability for injuries to persons or property and is therefore controlling here, for the reason that this action is based upon the Utah Statutes and Constitution creating a cause of action for wrongful death and the question whether such pass absolves appellee from liability to appellants is to be determined by the proper construction of the Utah Statutes and Constitution.

4. The Court erred in holding that appellee is not liable for the loss and damages suffered by appellants caused by its negligence in the operation of its train because of the pass contract for the following reasons:

(a) The provisions of the free pass do not purport to relieve appellee from liability in the event the user of the pass killed.

(b) Appellants were not parties to the contract set forth in the pass and therefore are not bound by its terms and provisions.

(c) The effect of such holding is to deprive appellants of property without due process of law in violation of the Constitution of the United States and the State of Utah.

5. This Court erred in holding that appellee, by its contract with decedent, Jack R. Francis, effectively insulated itself against liability to appellants for damages suffered by them as a result of appellee's negligence.

6. This Court erred by holding, in effect, that appellants could be deprived of property without due process of law contrary to the provisions of the Constitution of the United States and of the State of Utah.

7. This Court erred in holding that the opinion of the witness Dr. Ogilvie to the effect that the engineer on appellee's train was mentally incompetent at the time he failed to respond when the last red signal was passed was properly admitted in evidence, for the reason that the basis of such opinion had nothing to do with pathology or medicine and such testimony was on a subject relating to a matter of common knowledge and understanding and special training and professional experience was not required for its correct decision and such testimony therefore constituted an invasion of the province of the jury.

8. This Court erred in holding that the opinion of Dr. Ogilvie was admissible as a means of aiding the jury in resolving the issue of when the engineer passed the second red block signal.

9. This Court erred in holding that the Amended Motion for a New Trial, presenting the issue as to whether

the jury panel had been properly selected or not, was not filed within time in view of the fact that the trial court refused to strike said motion and supporting affidavits and passed upon the question presented thereby and no appeal was taken from the refusal of the Court to grant the motion to strike.

10. This Court erred in holding that the trial court did not abuse its discretion in denying the Amended Motion for a New Trial on the ground that the jury panel was improperly selected for the reason that if the jury panel was selected as shown by the affidavits and by the testimony adduced at the hearing on the motion the court clearly abused its discretion in denying said motion.

11. This Court erred in not definitely deciding the question, whether or not the jury panel was improperly selected for the reason that it is necessary to decide this question in order to determine whether or not the trial court abused its discretion in denying the Amended Motion for a New Trial.

WHEREFORE, it is respectfully submitted that this petition should be granted and upon a rehearing the decision of this Court should be set aside and a judgment entered reversing the judgment of the trial court, and appellee further prays for time for oral hearing and argument upon this petition.

PARNELL BLACK
B. E. ROBERTS
CALVIN W. RAWLINGS
HAROLD E. WALLACE

Attorneys for Appellants.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

SUMMARY OF ARGUMENT

POINT I.

THIS COURT ERRED IN FAILING TO FOLLOW AND APPLY THE CONSTITUTION, STATUTES AND CONTROLLING DECISIONS OF UTAH PERTAINING TO ACTIONS FOR WRONGFUL DEATH ARISING IN UTAH.

POINT II.

THIS COURT ERRED IN HOLDING THAT THE HEPBURN ACT AND CERTAIN FEDERAL DECISIONS IN EFFECT ABROGATED APPELLANTS' RIGHTS CREATED BY AND ARISING UNDER UTAH LAW.

POINT III.

THIS COURT ERRED IN PERMITTING APPELLANTS TO BE DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW.

POINT IV.

THIS COURT ERRED IN HOLDING THAT IT WAS PROPER TO PERMIT DR. OGILVIE TO STATE AS AN EXPERT WITNESS AN OPINION OUTSIDE THE FIELD OF MEDICAL KNOWLEDGE AND EXPERIENCE AND NOT BASED ON MEDICAL KNOWLEDGE, FINDINGS OR EXPERIENCE.

POINT V.

THIS COURT ERRED IN NOT REVERSING THE JUDGMENT HEREIN BECAUSE OF THE IMPROPER METHOD USED BY THE TRIAL COURT IN SELECTING THE JURY PANEL.

ARGUMENT

POINT I.

THIS COURT ERRED IN FAILING TO FOLLOW AND APPLY THE CONSTITUTION, STATUTES AND CONTROLLING DECISIONS OF UTAH PERTAINING TO ACTIONS FOR WRONGFUL DEATH ARISING IN UTAH.

Appellants' cause of action here was created by and arose under the laws of the State of Utah. Therefore, the Utah law must be followed on this appeal. It is respectfully submitted that the court erred in failing and refusing to follow Utah law in determining the issues presented.

Immediately upon the death of their father and mother, appellants, by virtue of the laws of the State of Utah, became possessed by a cause of action for their parents wrongful death. The question is, was it within the power of the parents during their lifetime to abrogate, change, modify, limit or encumber this right by entering into the contract with the wrongdoer relied upon by appellee as a defense to this action? This Court has asserted that such power exists and it is this holding which appellants challenge as being erroneous.

The rights created by the death statutes of the various states differ as do the characteristics of the rights of action based thereon as readily appears from a review of the decisions construing the laws of the various states creating these rights of action. See for instance the review of the decisions set forth in the opinion of the Supreme Court of the United States in *Mellon v. Goodyear*, 48 S. Ct. 541, 277 U. S. 335. The action may be a survival action only,

it may be a new and independent action, it may be one dependent upon the rights of the decedent immediately prior to death, or it may be one where the rights of the heirs are independent of any rights the decedent may have had during his lifetime, an action of such nature that decedent during his lifetime, both prior and subsequent to his injuries, was powerless to control, settle, compromise, liquidate, satisfy, discharge or abrogate by any means at his command whatsoever. *Halling v. Industrial Commission of Utah*, 71 Utah 112, 263 Pac. 78; *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, 167 Pac. 513 (cited by the Utah Court in the *Halling* case at page 118 of 71 Utah), holding that a release given by an injured person to the wrongdoer subsequent to his injury, but prior to death, was no defense to an action for wrongful death brought under the statute of California which is identical with the Utah Statutes. This decision is contrary to the decision of the United States Supreme Court in *Mellon v. Goodyear*, 277 U. S. 335, construing the Federal Employers' Liability Act.

The fact that the conclusion reached by the Supreme Court of California in the above case is contrary to that reached by the Supreme Court of the United States in the four cases relied upon by this court here would not be significant were it not for the fact that the above and other California decisions announcing similar holdings were relied upon by the Utah Supreme Court as the basis for its opinion in the *Halling* case. These decisions likewise support our contention that the court here erred, misconstrued and misapplied the Utah law which we believe to be controlling. We therefore take the liberty of quoting at some length from the opinion of the Supreme Court of California in the *Earley* case, supra.

"Section 377 of the Code of Civil Procedure, under which this action was brought, provides that:

> 'When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just.'

"The attorney for the appellant, and amici curiae adopting the same construction of the law as does appellant's attorney, have presented for the consideration of this court elaborate briefs discussing the origin of the right of action for wrongful death under Lord Campbell's Act, the varying statutes of the states of the United States passed after, and some in copy of the English act, and from a learned and elaborate analysis reached the conclusion that the wrong which the defendant committed —the tort upon the person of the deceased—was necessarily but a single wrong, and that, as the defendant had received its full acquittance and discharge from all consequences arising from that wrong from the injured man himself, the wrong itself was compensated for, and in point of law was extinguished, so that it could not be made the basis of any further action by any person whatsoever.

"It would not be without interest, but at the same time it is wholly unnecessary to follow these learned counsel in their analyses of the varying statutes and the decisions of the courts upon them. For when the last word shall have been said in such a consideration, the paramount fact will still remain that rights under our section 377 of the Code of Civil Procedure are to be defined not by what other courts have said touching their own statutes, but

from the meaning and intent of our own law derived from a reading of it. Upon this matter we are not without light from previous decisions. Thus in *Munro v. Dredging Co.*, 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248, referring to this section, it is said:

> 'It may be observed that the language of the statute of this state (section 377 C. C. P.) is broader than the language of the English statute.'

"In the case of *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 363, 57 Pac. 1065, 73 Am. St. Rep. 52, it is said:

> 'The statutes in the different states, though varying greatly, follow generally Lord Campbell's Act, 9 and 10 Victoria, c. 95. In that it was recited that no right of action existed at common law for such damages. It was then a new right of action. It could not be a continuance of the right which the injured man had for the injury; for the loss to his heirs did not accrue until he died. Under our statute the injured person might survive long enough to sue and recover damages, or to settle with the wrongdoer, and then, by his death, a new cause of action would accrue to his heirs. True, it has been held differently in some states, which have what are called 'survival statutes.' Here it has been ruled, as the fact evidently is, that the statute creates an entirely new cause of action.'

"Some statutes are but statutes of survivorship. They carry over to some living person after the death of the injured person precisely the right of action and precisely the right of recovery which the injured person would have had if his injuries had not resulted fatally. Manifestly under such a statute a composition agreement and release of the wrongdoer deprives the living person, who may have

been empowered by the statute to commence or carry on the action, of all right of recovery. But such is not our statute. Our statute creates a new right of action with a different measure of damage from that which accrued to the injured person as a result of the defendant's wrongdoing. The right of action is to the heirs or representatives of the deceased and the elements of damage (without here attempting to specify them all) include in the case of the widow an admeasurement of the financial loss occasioned to her by the death of her husband through the deprivation of his society, comfort, and protection. Upon the other hand, the right to recover for physical suffering—a right which is always an element of damage when the action is prosecuted by the wronged and injured person—is not from its nature an element of the damage which the heir or personal representative may recover under the action given by our statute.

"One simple illustration, we think, will make the matter quite plain. A servant suffers wrongful and debilitating injuries at the hands of a third person. That third person is, of course, liable to the injured servant. The injured servant, however, compromises with the wrongdoer for the injuries which he has received and gives him a full release and acquittance. At the same time and by reason of the same single tort the master has his right of action against the wrongdoer for the loss of his employe's services. This was the right of action recognized at common law and is recognized by the statute law of this state. Civ. Code, Sec. 49. Would any one contend that the release of the wrongdoer by the servant operates also as a release and discharge of the wrongdoer from his liability under the independent right of action given by the law to the master? That right of action is wholly independent, precisely as is the right of action created in favor of the heirs, and it is no less independent because it has its origin in the same tort. The judgment and order appealed from are therefore affirmed."

Tann v. Western Pacific Ry. Co., 39 Cal. App. 377, 178 Pac. 971 (cited by the Supreme Court of the State of Utah in the *Halling* case at page 118 of 71 Utah) wherein it was held that the statute of limitations pertaining to bringing of personal injury actions was not controlling in an action for wrongful death, but that the running of the statute of limitations in the latter action commenced with the death and not with the injury.

This decision is contrary to that of the Supreme Court of the United States in *Flynn v. New York, New Haven & Hartford Railroad*, 283 U. S. 53, cited by this court. In the *Flynn* case the court applied and construed the Federal Employers' Liability Act. *Blackwell v. American Film Co.*, 189 Cal. 689, 209 P. 999, (cited by the Supreme Court of Utah in the *Halling* case at page 118 of 71 Utah), wherein the court held that the satisfaction of a judgment obtained by decedent in an action instituted to recover damages for personal injury did not prevent a recovery by his wife inasmuch as she was suing, not to recover damages for the injuries and consequent sufferings and loss to decedent, but to recover as an heir or personal representative the damages she had sustained by reason of decedent's death. This holding contrary is the holding of the United States Supreme Court in *Mellon v. Goodyear*, 277 U.S. 335 construing the Federal Employers' Liability Act and relied on by this court in this case.

Rowe v. Richards, 35 S.D. 201, 151 N.W. 1001, L.R.A. 1915E, 1075, Ann. Cas. 1918A, 294; *Phillips v. Community Traction Co.*, 46 Ohio App. 483, 189 N.E. 444; *Routh v. List & Wetherly Const. Co.*, 124 Kan. 222, 257 P. 721, 62 A.L.R. 150; *In re Cripp*, 216 Mass. 586, 104 N.E. 565; *American Steel Foundries v. Industrial Commission*, 361 Ill. 582, 198

N.E. 687; *Stokes v. Collum Commerce Co.*, 120 Okla. 133, 252 P. 390. Admissions made by the deceased person during his life are inadmissible in an action for his wrongful death. *Marks v. Reissinger*, 35 Cal. App. 44, 169 P. 243. A judgment for injuries sustained is not a defense to an action for wrongful death. *Robinette v. May Coal Co.*, 31 Ohio App. 113, 166 N.E. 818; *Dayhuff v. Brown & Allen*, 150 Ga. 290, 103 S.E. 458.

Releases made prior to injury or death have been held no defense to an action for death. *Rovegno v. San Jose Knights of Columbus Hall Ass'n.*, 108 Cal. App. 581, 291 P. 848. The court in the above case also held that the defense of assumption of risk was unavailable to the defendant as a defense against the mother's action for her son's wrongful death. *Chicago, R.I.&P. Ry. Co. v. Martin*, 59 Kan. 437, 53 P. 461; *Pittsburgh, C. C. & St. L. R. Co. v. Hosea*, 152 Ind. 412, 53 N.E. 419; *Tingley v. Long Island R. Co.*, 96 N.Y.S. 865.

In the opinion here the court erred in basing its holding on the assumption that under the law of the State of Utah "it is essential to the maintenance of the action that the wrongful act or default be of such character that the decedent could have maintained an action to recover damages for his injury if death had not ensued." It is granted that the foregoing is a correct statement of the law as it exists in many jurisdictions. (See *Northern Pacific Railway Co. v. Adams*, 192 U.S. 440; *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59; *Mellon v. Goodyear*, 277 U.S. 335; *Flynn v. New York, New Haven & Hartford Railroad Co.*, 283 U.S. 53). It is apparent, however, that there is no such limitation on the right of action

for wrongful death under the laws and statutes of the State of Utah.

Unless the court is willing to declare as matter of law that the right of action which the minor appellants have sought to enforce was changed, modified or abrogated by the contract entered into between the parents and appellee in consideration of the free pass then the decision of this Honorable Court is erroneous.

No contention has ever been made in these proceedings, either here or elsewhere, that the Hepburn Act limited, qualified or abrogated appellants' right of action for wrongful death in any respect whatsoever. It is submitted that Congress in passing the Hepburn Act did not intend and cannot be presumed to have intended to abrogate, limit or destroy rights of action for wrongful death provided by the constitutions and statutes of the various states or to in any other way or manner take, change or destroy the property or property rights of persons not parties to passes, or to contracts made in consideration of the issuance of passes. We submit that the necessity or need for such an intentment, does not and cannot be made to appear. If no such abrogation, limitation or destruction of property, property rights or causes of action was accomplished or intended by the Hepburn Act itself, then it must necessarily follow that a contract limiting the liability of the carrier to the holder of a free pass would not be sufficient to limit, abrograte or destroy a right of action for the wrongful death of the pass holder created for the benefit of and possessed by persons not parties to the pass or to the contract made in consideration of its issuance in states where the cause of action for wrongful death is new, independent and beyond the power of control, direction, destruc-

tion, release or satisfaction by decedent during his lifetime. Such is the nature and characteristics of the wrongful death action created by the constitution and laws of the State of Utah. Such is the nature and characteristics of the cause of action sought to be enforced here.

If we are correct on this statement and conclusion, then it must necessarily follow that the court erred.

What are the legal aspects of the cause of action for wrongful death created by the Constitution and Statutes of the State of Utah and the decision of the Supreme Court of the state construing, interpreting and applying the same? The Constitution provides:

> "The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law." Sec. 5, Art. 16, Constitution of Utah as amended.

The present statute of the State of Utah creating a right of action for wrongful death is found in Section 104-3-11, Utah Code annotated, 1943, and provides:

> "Except as provided in chapter 1, of Title 42, when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death, or, if such person is employed by another person who is responsible for his conduct, then also against such other person. If such adult person has a guardian at the time of his death, only one action can be maintained for the injury to or death of such person, and such

> action may be brought by either the personal representatives of such adult deceased person, for the benefit of his heirs, or by such guardian for the benefit of the heirs as provided in the next preceding section. In every action under this and the next preceding section such damages may be given as under all the circumstances of the case may be just."

Prior to 1898, Sec. 2961, Compiled Laws of Utah 1880, contained the provision:

> " * * * and the act, neglect or default is such as would, if the death had not ensued, had entitled the party injured to maintain an action * * * "

This provision was eliminated from the Utah Statutes by the State Legislature in 1898 in the first revision of laws after statehood. This historical background is significant in any appraisement or construction of the Utah Wrongful Death Statutes and laws. The legislature must have had a definite purpose in mind when this language was eliminated from the law. Certainly a change and modification of law was contemplated and undertaken. It would be unreasonable to assume that the legislature, by eliminating this provision, contemplated no change in the laws whatsoever.

It is submitted that the most reasonable conclusion deducible from this act is that the legislature intended to eliminate any requirement, in wrongful death actions arising in Utah, that the act, neglect or default be such as would, if death had not ensued, entitle the party injured to maintain an action. This preexisting requirement is just exactly what was eliminated. This Court by its opinion has thwarted the legislature of the State of Utah and by

judicial legislation has amended our laws and reinserted the above restrictive requirement into the State Statute.

This court in its opinion makes no effort to determine the proper and accepted construction of these constitutional and statutory provisions by referring to their history or to the interpretation placed on them by the Supreme Court of Utah.

To support its position that these words should be judicially reinserted into the Utah law, this court has cited constitutional, statutory and case law where Wrongful Death Statutes have been held in effect to be survival statutes.

In the case of *Northern Pacific Railway Co. v Adams*, 192 U.S. 440, the United States Supreme Court construed and applied the Idaho statute as being a survival statute and that construction was later adopted by the Idaho Supreme Court in *Helgeson v. Powell*, 54 Idaho 667, 34 P. (2d) 957. That the Idaho law on this vital point is contrary to the law in Utah is clearly revealed by a comparison of the decision in *Helgeson v. Powell* (Idaho) supra., and *Halling v. Industrial Commission* (Utah), supra. The other three cases relied upon by this court *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59; *Mellon v. Goodyear*, 277 U.S. 335, and *Flynn v. New York, New Haven & Hartford Railroad Co.*, 283 U.S. 53, construed and applied the Federal Employers' Liability Act.

In neither of the four cited cases did the Supreme Court of the United States purport to construe, interpret or apply the laws and/or statutes of any state or jurisdiction where the law, by enactment, construction or otherwise, is similar to the law in Utah on the question; "Is it essen-

tial to the maintenance of a wrongful death action that the wrongful act or default be of such character that the decedent could have maintained an action to recover damages for his injury if death had not ensued." It is granted that under the laws of Idaho as announced in the *Adams* case, and under the Federal Employers' Liability Act, as declared in the *Vreeland, Mellon* and *Flynn* cases, supra, the wrongful act or default must be such that the decedent could have maintained an action to recover damages for his injuries if death had not ensued. This, however, is contrary to the law in the State of Utah as announced by its highest court in *Halling v. Industrial Commission,* supra. Inasmuch as this vital difference in the legal aspects of the law was not recognized by the court, error was committed in affirming the judgment of the trial court.

The delect which forms the basis of plaintiffs' action and the wrongful death took place and occurred in the State of Utah, and the Supreme Court of Utah in the *Halling* case, supra, having construed, applied and declared the law here controlling, neither the Federal Employers' Liability Act nor the laws of the State of Idaho with respect to such action is material. *Erie Railroad Co. v. Thompkins,* 304 U.S. 64. Since the above decision there can no longer be any question but what the Utah law, as set forth in its Constitution and Statutes, and as construed and declared by its highest court, must be regarded and accepted as the controlling law of this case.

This court properly cited and relied upon the Utah cases of *Mason v. Union Pacific R Co.,* 7 Utah 77, 24 P. 796; *Halling v. Industrial Commission,* 71 Utah 112, 263 P. 78, and *Morrison v. Perry,* 104 Utah 151, 140 P. (2) 772, in support of the holding that the Utah statute does not

provide for the survival of a right of action and does not transfer a right of action from the decedent to his heirs, but that it creates a new and independent right of action in the heirs which did not exist at common law, and that such right of action is separate and distinct from any action which the decedent might have maintained for personal injuries had he survived the accident.

The court, however, then committed error by stating the following as the controlling principle of law:

> "* * * and it is essential to the maintenance of the action that the wrongful act or default be of such character that the decedent could have maintained an action to recover damages for his injury if death had not ensued."

To maintain this propostion it became necessary for the court to ignore the Utah case wherein the identical question was decided and a contrary result reached. The Court rests its holding on the four cases from the United States Supreme Court above referred to. These cases are foreign to the statutes of the State of Utah and likewise contrary to all other statutes which have received a construction and interpretation similar to that placed upon the Utah statute by the highest court of the state. (see *Halling v. Industrial Comission of Utah*, supra.) By so declaring the law this court has nullified and held for naught, important rights created by and under the laws and statutes of the State of Utah. There is a well recognized distinction between survival statutes based in the main on the so-called Lord Campbell's Act and statutes which create a new and independent cause of action in the heirs. (See for instance the authorities relied upon by the Supreme Court of Utah

in the *Halling* case, supra, cited at page 128, Vol. 71 of the Utah Reports).

Inasmuch as the *Halling* case passed directly on the controlling point in issue, we are at a loss to understand why it was not considered and given effect in determining the matters presented on this appeal. In the hopes that our discussion of the *Halling* case may redirect the attention of the court to its teachings and its importance here, we take the liberty of commenting upon it in detail. The following dates are important. On June 10, 1925 and on August 8, 1925, Mariner Halling suffered injury during the course of his employment by Henderson. On September 9, 1925, he filed written application before the commission for adjustment of his claim for compensation for the injuries aforesaid. Hearing was had on the application October 7, 1925 and the commission found:

> "The applicant, on the 8th day of August, 1925, was not injured by reason of an accident arising out of or in the course of his employment while regularly employed by Henning Henderson."

In due time petition for rehearing was filed, and on March 9, 1926 it was heard, determined and denied by the commission. No appeal was taken from the decision and it became final. Thereafter, on December 7, 1926, Halling died. On February 11, 1927, his wife, on behalf of herself and five minor children, filed an application with the Industrial Commission for compensation on account of the death of her husband, claiming that he died as a result of the injuries suffered by him in June and in August of 1925. Upon the hearing the commission, amongst other things, held and found:

> " * * * his wife and minor children, who claim through him, could be in no better position before the commission than the deceased himself, and that therefore we are without jurisdiction to entertain this application, and that for this reason the case should be dismissed."

In other words, compensation was denied because it appeared that if Halling had not died and had appeared before the commission claiming compensation, his claim would have been denied because of the former adverse adjudication which had become final for want of appeal and therefore there was no enforceable claim in existence. This holding of the commission is significant here because it is directly in line with the court's declaration of law which furnished the foundation for the judgment of affirmance.

In stating the controlling proposition presented in the *Halling* case, the Supreme Court of Utah stated:

> "The sole question before us for review in this proceeding is whether or not the commission properly dismissed the application of Rose J. Halling and her minor children for the reasons stated by the commission in its decision."

In resolving the issues presented, the court placed the matter squarely upon the rights of Mrs. Halling and her children under the constitutional provisions of the State of Utah and Wrongful Death Statute hereinabove set forth.

The defendant advanced the proposition that inasmuch as an award under the Workmen's Compensation or Industrial Act is not made on the theory that a tort has been committed, but on the theory that the statute giving the award is read into and becomes a part of the contract, the

law pertaining to wrongful death actions under the constitution and statute of the State of Utah was not applicable. This claim was denied by the Supreme Court in unequivocal language:

> " • • • In either case the employee or his dependents are without any remedy, except to accept the compensation provided by law. *As we have indicated, the right of an employee's dependents to recover for wrongful injury resulting in the death of such employee is not the result of any contract. It is a constitutional right which cannot be denied dependents without their consent, except by a court or other judicial tribunal of competent jurisdiction after notice given and a hearing had. To hold otherwise would be depriving the applicant of property without due process of law.*
>
> 'A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference.' 2 Cooley's Constitutional Limitations (8th Ed.) p. 756, and cases, cited in the footnote.
>
> *"If the dependents of Mariner Halling have a right to be heard on their claim for compensation in case his injury and resulting death was caused by the negligence of his employer, then it follows that such dependents likewise have such right to be heard on their claim for injury resulting in his death, in the absence of any negligence of his employer so long as such injury and resulting death arose out of or was received in the course of the employment of the deceased.* The Workmen's Compensation or Industrial Act makes no distinction between a claim based upon negligence of the employer and a claim not founded on any negligence of the employer. *Prior to the enactment of Laws Utah 1921, c. 67, by both judicial construction and constitutional provision, the rights of the employee's dependents in case*

death resulted from wrongful injury were separate and distinct from the rights of the employee for such injury. The law has not been changed where the employer wilfully injures the employee, nor in case the relation of employer and employee does not exist. We find nothing in the language of the Workmen's Compensation or Industrial Law in its present form indicating any legislative intent to change the nature of the rights of the dependents who claim compensation under the provisions of such law rather than under the law as it existed before we had a Workmen's Compensation or Industrial Act. In the main, the reasons advanced in support of the conclusions reached in the case of *Mason v. Union Pacific Railroad Co.*, supra, are applicable here. *We are therefore of the opinion that the wife and minor children of Mariner Halling did not, and could not, derive any claim for compensation through the deceased, but their claim is separate and independent of any claim deceased may have had during his lifetime.* It is earnestly contended on behalf of defendants that, if the law is not such that Rose J. Halling and her minor children are bound by the adverse decision against Mariner Halling during his lifetime, serious consequences will result to the dependents of other employees who die as a result of injuries actually received in the course of or growing out of their employment. Our attention is called to the rule as to mutuality of judgments under which a party is not bound by a judgment in a subsequent proceeding, unless the adverse party seeking the benefit of the former adjudication would have peen prejudiced if it had been determined the other way. It is thus urged that, if the widow and minor children of Mariner Halling are not to be bound by the adverse decision against the claim for compensation of Mariner Halling, they could not have taken advantage of a decision of the commission holding that Mariner Halling received an injury in the course of, or growing out of, his employment; that if the dependents may not rely upon the find-

ings in favor of an employee during his lifetime, his dependents, after his death and consequent loss of his evidence, may find it impossible to establish a just and proper claim against the employer, if such dependents are compelled to again establish the fact that the injury arose out of or in the course of the employment of the deceased. Our attention is called to the case of *Biederzycki v. Farrell Foundry & Machine Co.*, 103 Conn. 701, 131 A. 739. It is there held that where the commission found that an employee was found entitled to the compensation during his lifetime because of his injury, such findings 'must be accepted as final and conclusive in so far as they bear upon the dependent's claim, and the only additional facts which must be established by the dependent are, first, the death of the employee, second, dependence upon him, and third, the causal connection between the injury for which he was awarded compensation, and his death.' The quotation is from the syllabus.

* * * * * * *

"In the case of *Biederzycki v. Farrel Foundry & Machine Co.*, supra, *the defendant had been given one opportunity to be heard, but the applicants in this case were in no sense given any opportunity to be heard in the proceedings had upon the application of Mariner Halling. The applicants in the instant case were entire strangers, in a legal sense, to the proceedings had upon the application of Mariner Halling. They may or may not have known of the former proceeding. It is clear that they had no right to control the former proceedings, nor to produce or cross-examine witnesses, nor to appeal from the judgment rendered, nor to prevent Mariner Halling from filing or refusing to file his application for compensation.*

"While a court, or commission exercising judicial functions, may, upon grounds of public policy, limit a person to one opportunity to be heard in a

proceeding affecting such person's property rights, neither a court nor other judicial tribunal may deny a person a constitutional right or deprive such person of a vested interest in property without any opportunity to be heard. To do so constitutes taking of property without due process of law. The conclusions reached in the case of Biederzycki v. Farrel Foundry & Machine Co., supra, are not necessarily inconsistent with the views herein expressed.

"From what has been said, we do not wish to be understood as holding that, where an employee, during his lifetime, recovers a judgment for compensation for an injury arising out of or in the course of his employment, his dependents, after his death, may rely upon such judgment as being binding upon the employer. This question is not before us in this proceeding, and we reserve expressing any opinion in such case until the question is properly presented for our determination.

"*What we do hold is that, under the Workmen's Compensation or Industrial Laws of this state, Rose J. Halling and her minor children have a right to be heard on their application for compensation after the death of Mariner Halling. The fact that Mariner Halling, during his lifetime, was denied compensation because, as found by the commission, the injury did not occur, is in no way binding upon the applicants in this proceeding.* The order dismissing the application of Rose J. Halling and her minor children for compensation is reversed, and this cause is remanded back to the Industrial Commission, with directions to hear and determine the application herein without regard to the decision rendered upon the application of Mariner Halling." (Italics added)

If the fact that the final denial of Halling's petition for the compensation claimed by him for injuries sustained in the course of his employment was in no way binding

upon his heirs and if the final adverse adjudication of his claim during his life time in no way embarrassed, abrogated, encumbered, modified or limited his heirs right of action to recover compensation for his death under the Utah constitutional provisions and statutes for wrongful death, it is difficult to perceive how the contract entered into between Jack Francis and his wife with the appellee prior to injury and death could defeat the cause of action of the children for the wrongful death of their parents which arose under and was created by the same identical statutes.

It is rather difficult to determine from the decision whether or not it was decided that, in view of the contract, the railroad company owed no duty to Mr. and Mrs. Francis except to refrain from injuring them, fatally or otherwise, by any wanton, willful of intentional misconduct. It is submitted that a holding to the effect that by the contract the railroad company became possessed of an irrevocable license to injure or kill the decedent by any act or conduct short of willful, wanton or intentional misconduct, would constitute the approval of a doctrine as wicked and uncivilized as ever existed in the laws of any country. The most that can be said for such contract is that it provided the railroad with an adequate defense in any action to re-recover damages for personal injuries sustained by one while travelling as a passenger on the pass.

The Utah laws provide a cause of action to the heirs of any person suffering death as a result of the wrongful act or neglect of another. It is submitted that the determination of the question whether any given conduct, act or omission constitutes "wrongful act or neglect" within the meaning of the statute depends upon the principles of general law and is not a matter to be resolved by the inter-

pretation of a particular contract. Even granting for the purpose of argument that the quality of appellee's conduct as being negligent, wrongful or otherwise might be lawfully and properly determined as between appellee and Mr. and Mrs. Francis on the basis of the contract and regardless of the law generally; it is submitted that such determination could not and should not be binding upon appellants and thus destructive of their rights inasmuch as they were not parties to the agreement in any manner or sense whatsoever. It would lead to legal complications, confusion and the complete defeat of justice to hold that the nature, quality and legal characteristics of appellee's conduct be identified, determined and appraised by the raw terms of the contract. Would the court permit the most priceless of rights, the right of children to their parent's protection, support, maintenance, teaching, love and care to be brought and sold on the open market by express contract or otherwise? Would the court permit these rights to be destroyed or abrogated by a strict and unnecessary interpretation of a contract, to which these children were never parties? It is submitted that from a purely rational point of view the railroad company owed the same duty of care to every person on the train whether the person was a paying passenger, a free pass passenger, or one otherwise travelling upon the train with the consent and knowledge of the company. It might be that as between the railroad company and a free pass passenger the company would have an adequate defense to any action for damages growing out of the negligent operation of the train by reason of the contract. This defense would not be grounded on the theory of non-existence of duty, but would merely mean that the railroad company, by the contract, had insulated itself against liability for failure to discharge

this duty of reasonable care. The railroad company owed Mr. and Mrs. Francis the duty of exercising ordinary care for their safety by reason of the fact that it accepted the responsibility of carrying them as passengers and by reason of the further fact that Mr. and Mrs. Francis were human beings. To hold otherwise would rob the law of any element or quality of ordinary justice based on the great humanitarian principal underlying all of the law of negligence.

In the case of *Southern Pac. Co. v Schuyler*, 227 U.S. 610, 57 L. Ed. 662, 43 L.R.A. (N.S.) 901, affirming 37 Utah 581, 109 P. 458, an employee in the railway mail service, in good faith and with the consent of the carrier, accepted free passage in interstate transportation from San Francisco to Ogden. This was subsequent to the passage of the Hepburn Act. While enroute he lost his life as the result of a train wreck. Both the Utah, and the United States Supreme Courts, held that this passenger did not forfeit his right to the benefit of the rule of the local law which charges a carrier with the duty to exercise care for the safety of gratuitous passengers. The language of the Supreme Court of the United States is interesting. We quote:

> "* * * In this connection the court said: 'It is argued (b) that it was beyond the power of the state court to 'read into the Hepburn act (this paragraph) an exception in favor of gratuitous passengers'; thereby (as is said) enlarging the class to whom Congress limited the right of free interstate transportation. This is ingenious, but, as we think, unsound. As applied to the concrete case, it is equivalent to saying that the operation of the Hepburn act is such as to deprive one who, in good faith and without fraud, and with the consent of the car-

rier, but in actual though unintentional violation of the prohibition of the act, accepts a free passage in interstate transportation, of the benefit of a rule of local law that renders the carrier in such circumstances responsible for exercising care for the passenger's safety because the carrier has voluntarily undertaken the burden of such care. But the act itself declares what penalty shall be imposed for a violation of its prohibition: 'Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty.' This penalty is not to be enlarged by construction. Neither the letter nor the spirit of the act makes an outlaw of him who violates its prohibition by either giving or accepting gratuitous interstate carriage. The deceased no more forfeited his life, limb, or safety, and no more forfeited his right to the protection accorded by the local law to a passenger in his situation, than the carrier forfeited its right of property in the mail car upon which the deceased rode. His right to safe carriage was not derived according to the law of Utah, from the contract made between him and the carrier, and therefore was not deducted from the supposed violation of the Hepburn act. It arose from the fact that he was a human being, of whose safety the plaintiff in error had undertaken the charge. With its consent he had placed his life in its keeping, and the local law thereupon imposed a duty upon the carrier, irrespective of the contract of carriage. The Hepburn act does not deprive one who accepts gratuitous carriage, under such circumstances, of the benefit and protection of the law of the state in this regard."

Is the duty of care to one who rides the train without

ticket or free pass greater than to one who rides the train in full compliance with the requirements of the law and company rules?

POINT II.

THIS COURT ERRED IN HOLDING THAT THE HEPBURN ACT AND CERTAIN FEDERAL DECISIONS IN EFFECT ABROGATED APPELLANTS' RIGHTS CREATED BY AND ARISING UNDER UTAH LAW.

In affirming the judgment of the trial court, this Court relies upon the Hepburn Act, as amended, 49 U.S.C.A. Sec. 1, *Northern Pacific Railway Co. v. Adams*, 192 U.S. 440, and *Kansas City Southern Railway Co. v. Van Zant*, 260 U.S. 459. Neither the Hepburn Act nor the cited cases are determinative of the issues raised on this appeal. In *Kansas City Southern Railway Co. v. Van Zant*, supra, the Supreme Court of the United States held that Congress by the enactment of the Hepburn Act, assumed control over the entire field of free passes issued by railroad companies pursuant thereto. Congress, however, did not by the enactment of the Hepburn Act, purport to assume control over every field of law that might be involved, collaterally or otherwise, in the use or issuance of free passes. Congress certainly could not be presumed to have intended by that enactment to assume control over wrongful death actions generally, nor thereby to limit the unquestioned power of of the states to determine the nature, extent and characteristics of wrongful death actions arising within their borders. We submit that no such limitation or control of wrongful death actions arising under state laws is necessary, useful or required in order to give full force and

effect to the Hepburn Act or any part or portion thereof or to afford and permit full control of the issuance of free passes under said Act. We submit that the recognition and enforcement of the rights claimed by appellants here cannot be deemed an infringement on the admitted power of Congress to control and regulate interstate commerce, neither can the recognition or enforcement of appellants rights in any way infringe upon the right of Congress to control the issuance and use of free passes. Without question, the validity of free passes and contracts limiting liability of carriers entered into in consideration of the issuance of such passes is a question of federal law under the *Van Zant* case. The validity of the free pass in the case at bar and/or the validity of the contract entered into in consideration of its issuance has never been questioned here. In the *Adams* case the Supreme Court held that a contract limiting the liability of the railroad company to the holder of the pass, entered into in consideration of the issuance of the pass, was valid, not as matter of federal law, but as a matter of general law. In the *Van Zant* case the court concluded from the holding in the *Adams* case that under federal law contracts limiting liability entered into between the carrier and the passenger in consideration of the issuance of the pass are not void as against public policy. Whether the pass contract here be held valid or void can not affect or determine the rights of appellants in their action to recover damages suffered by them as result of their parents wrongful death. The contract evidenced by the pass was between decedent and appellee. Appellants were not parties to it and should not be required to suffer the loss of their birthright because of it. The contract does not purport to cover or limit the rights of appellants, the children of the deced-

ents, if it did it would be void as to them.

If appellants right of action under controlling law was made to depend upon the existence of an enforceable right of action in decedent at the time of his death, then the pass contract here would defeat appellants, not by reason of their being bound by the contract, but because the enforcement of their right of action, being dependent upon the enforceability of their parents right of action prior to death, would likewise be unenforceable. It is clear, however, as heretofore indicated, that under Utah law appellants' rights are wholly independent of the rights of their father at and prior to death. Hence, the contract between decedent and the railroad company is not binding upon appellants, and since their cause of action does not depend upon the existence of an action enforceable by decedent prior to his death, the contract is immaterial here.

In the paragraph of the opinion (page 4) which contains the discussion of the Hepburn Act, appears the statement that where the holder of a pass, containing a provision limiting liability, uses it for transportation on a train in interstate commerce and is killed while enroute, the company is not liable to the surviving heirs of the deceased under a state statute, such as the Utah Statute. The *Adams* case is cited as authority. In the first place, this Court was not called upon to construe and apply a statute similar to the Idaho Statute discussed in the *Adams* case. In that case the Idaho Statute was given an interpretation, construction and application contrary to that given the Utah Statute by the State's highest court. The Idaho Statute as matter of law and fact is therefore contrary to the Utah Statute, and this alone should have required

a reversal.

Certainly the Court did not intend to infer that the pass provisions could be given a construction which would affect an abrogation of the rights of persons arising under Wrongful Death Statute who were not parties to the contract and in no way bound thereby. There is certainly no judicial authority or justification for such a holding. We hesitate to assert that this Court intended to so hold, but the language of the court may be said to carry that implication. The only reason the Supreme Court of the United States, in the *Adams* case, held the pass to be a defense to the action of the heirs of the decedent, was the companion holding that the decedent had no enforceable cause of action against the railroad company at the time of his death and that the existence of an enforceable right of action in decedent immediately prior to death was a condition precedent to the enforcement of the heirs right of action. Upon this theory the court held the pass conditions an adequate defense. The Court did not hold that the heirs were parties to contract or that they were bound by its provisions. We submit that none of the authorities cited by the Court are applicable to the case at-bar, but that the decisions heretofore cited in appellants' brief, are controlling and should be followed.

We earnestly contend that unless the enforceability of the right of action for wrongful death created by the Constitution and Statutes of the State of Utah as interpreted, construed and applied by its highest court, depends upon the existence of an enforceable cause of action in the decedent immediately prior to death, then the court here has sanctioned the taking of the property of appellants without due process of law.

POINT III.

THIS COURT ERRED IN PERMITTING APPELLANTS TO BE DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW.

We respectfully submit that the holding of this Court that it was within the power of the railroad company and decedent to defeat the rights and destroy the valuable property interests of appellants by the mere act of entering into a contract, has given legal sanction to the taking of appellants' property without due process of law, contrary to the provisions of the Constitution of the United States and the Constitution of the State of Utah. The Supreme Court of Utah in *Halling v. Industrial Commission of Utah,* supra, held that the abrogation of a right of action for wrongful death without the legal consent of the heirs was and constituted the taking of property without due process of law. The Court states:

> "To hold otherwise would be depriving the applicant of property without due process of law."

By what authority and upon what legal justification can this Court sanction the deprivation of appellants' rights and the destruction of their property interests in this case? Would the Court permit decedent and the railroad company, by contract or sale, or by any form of transaction to dispose of the property of appellants without their consent or without legal sanction be such property personal, real or chose in action? Appellants possessed a property interest of great value in the continued existence of their parents. The law of Utah granted and created for their benefit a chose in action for the wrongful death of appellants parents which was in itself a property

right of substantial value. That property belonged to them and was independent of any rights which the parents may have had during their lifetime. Appellee owed appellants the duty of refraining from injuring or destroying their property rights by any wrongful act or neglect whatsoever. This action was founded and based upon the failure of appellee to discharge that duty.

Apparently this court takes the view that the Hepburn Act enacted under the Commerce clause of the United States Constitution requires a holding that appellants rights were destroyed by the contract. As pointed out in our previous brief, the exercise by Congress of the powers delegated to it under the Commerce clause of the Constitution of the United States is subject to the Fifth Amendment, which provides that a person shall not be deprived of property without due process of law. (See *Currin v. Wallace,* 306 U.S. 1). Nevertheless this Court has held that the contract, evidenced by the pass, and which did not purport to cover or dispose of the rights of appellants, defeats their independent cause of action and takes from them their property interest in the continued existence of their parents without any consent on their part, without any agreement on their part, and without any process of law whatsoever. The effect of the opinion of this Court does violence to the Fifth Amendment of the Constitution of the United States and without doubt takes from appellants property and valuable rights without due process of law and without just or any consideration.

POINT IV.

THIS COURT ERRED IN HOLDING THAT IT WAS PROPER TO PERMIT DR. OGILVIE TO STATE AS EXPERT WITNESS AN OPINION OUTSIDE THE FIELD OF MEDICAL KNOWLEDGE AND EXPERIENCE AND NOT BASED ON MEDICAL KNOWLEDGE, FINDINGS OR EXPERIENCE.

We respectfully submit that the Court did not properly analyze or appraise the merits of appellants contention respecting the assigned error of the trial court in receiving Dr. Ogilvie's testimony over the objection of appellants. Ogilvie's objectionable expert testimony was not based or founded on his knowledge or experience as a pathologist; this he exhausted without justifying, producing or establishing his opinion. Dr. Ogilvie was admittedly unable to establish or find support for his opinion as to when the engineer died with respect to the time the last red block was passed from his training experience or the autoptical report. All that the autoptical report indicates was that the death had occurred before the steam came in contact with the body and that death was due to a heart disease. The doctor was permitted, without objection, to state in full detail any and all opinions which he cared to state which were based upon his special training and experience as a pathologist and as revealed to his expert mind by the autoptical report. The objectionable opinion pertained to facts clearly outside the scope of the report and pertained to matters which were not revealed to him by, and through his study, experience and training as a pathological expert. Suppose for instance, that I address a friend of mine and he makes no reply or response. Would it be

permissible to permit some medical expert to come into court and testify that my friend was either dead or mentally incompetent at the time he failed to make response? Though such evidence would be clearly inadmissible, that is just exactly what happened and was sanctioned in the case at bar.

Dr. Ogilvie first testified that in his opinion the engineer died from advanced coronary arteriosclerosis, with either a terminal occlusion of a minute vessel which supplies the conduction bundle, or he suffered an acute spasm of one or more other vessels which led to exemia so-called, and decreased the blood supply to his heart sufficiently to cause death (R.180). He testified that the burning of the skin had occurred prior to death. Dr. Ogilvie then testified that the fatal heart attack and the termination of circulation were simultaneous (R. 184), and he further testified:

> "Q. Now, I take it, Dr. Ogilvie, that depending upon the violence of that onset, the patient may die suddenly or within seconds or minutes or whatever the case may be depending on the particular case?
>
> "A. That is right. He may die right now or he may live for a matter of seconds, minutes, or even a week or so."

He also testified:

> "Q. Now, as a matter of fact, you can't tell, either from your experience or training or from a study of this autopsy report exactly when McDonald died, can you?

"A. Not absolutely, no, not down to the fraction.

"Q. And you can't tell how long it required for death to ensue after the attack began, can you?

"A. No, you can't be sure of that.

"Q. You can't tell how long it was before the circulation stopped, can you?

"A. Yes, if you know when he dies you can tell when circulation stops.

"Q. And the circulation would stop at the instant of death, isn't that true?

"A. The minute his heart stops.

"Q. You mean right now, don't you?

"A. The second or the fraction of a second his heart stops the circulation stops and he is dead.

"Q. When the last heart beat has taken place the circulation stops?

"A. That is right. (R.192)

"Q. And then at any time after that if the body was subjected to steam heat or the skin was punctured you would expect to find the exact results that were found in this examination by Dr. Queen?

"A. Yes, if he is dead that is right.

"Q. In other words, the only thing that would be necessary would be that death took place before the application of heat or steam that the skin was punctured?

"A. That is right." (R.193)

It is clear from the foregoing testimony that so far as medical knowledge is concerned the autoptical report furnished the only basis for the medical opinion. Then in order to have a medical expert argue its case, appellee asked this expert the effect of lack of response, and over objection, the expert was permitted to answer.

Let us analyze the question asked this witness (R.186). The first thing which the witness is asked to assume is that McDonald was an engineer of long experience, subject to certain rules. We do not believe that this Court or anyone else would assume that this had anything at all to do with a medical determination of the instance of McDonald's death. The next assumption is that one of the rules under which this engineer operated was that he would stop his train upon reaching a red signal. Here again we ask what possible materiality to the eventual conclusion given by the expert could this fact have? Every engineer on the road is subject to the same rule and if he violates it and is later found dead from heart trouble, can it be said that he was mentally incompetent when he ran the red light? Another rule was that he should respond to the fireman when the fireman calls a red signal. This is in the same catagory with the other rule. Next it was assumed that the train was moving 50 to 60 miles an hour when it came to a red signal. It cannot be said that this fact could have any possible relevancy to the eventual conclusion expressed by this witness. This is just more window decorating made so that the appellee might have its paid expert argue its case more impressively to a lay jury. It is next assumed that the fireman, in a very loud voice, called that the signal was red and the engineer made no response by voice or in any other manner discernable to the fireman.

There was nothing in the evidence to show that this fact could in any way form the basis of a medical opinion. The autopsy established that death was caused by a heart condition. The autopsy, of course, did not reveal the exact time of death. There was nothing in the autopsy which in any way indicated that the engineer had been either unconscious or dead for any period of time except that he was dead when the steam hit his body. This medical expert was allowed to testify that because the engineer was not heard or seen to respond to a signal, he was therefore mentally incompetent or dead at the time he failed to so respond. We have exhaustively read the cases and have found no instance where any such testimony as this has ever been permitted. Counsel for appellee certainly cited none in their brief or argument before this court. The ruling admitting this testimony is contrary to the authorities cited in the brief of appellants heretofore filed, and particularly the following cases: *Henkel v. Varner*, 138 F. (2d) 934; *Metropolitan Life Ins. Co. v. Armstrong*, 85 F. (2d) 187; *Thomas v. Inland Motor Freight*, 190 Wash. 428, 68 P. (2d) 603; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U.S. 551; *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469; *Lee v. Salt Lake City*, 30 Utah 35, 83 Pac. 562.

This court recognizes the rule announced in these cases but refuses to apply it here. The Court states that the opinion of a witness qualifying as an expert is not admissible in evidence where the question for determination by the jury depends entirely on common knowledge and common understanding, and no special training or experience is required for its correct decision. A reading of the hypothetical question and answer shows that Dr. Ogilvie

based his conclusion that the engineer was incompetent or dead at the time he failed to respond, entirely upon his failure to respond. An interesting thing about this is that the hypothetical question does not directly assume such fact, but states that the fireman in the same cab did not discern any response. So far as Dr. Ogilvie's conclusion is concerned the fireman could have been in no position to have heard or seen a response and certainly we know that the fireman here was busily engaged in his own tasks at the time he called out the aspect of the signal and during the time immediately following.

This Court seems to be of the opinion that the hypothetical question and the answer thereto permitted the expert to bring into "appropriate relation the pathological conditions and the physical facts and circumstances existing immediately before and after the fatal accident." It does not appear that they had any relation at all.

Dr. Ogilvie testified that from the autoptical report he could not tell when death occurred or when the heart attack occurred except that it was before steam hit the body. That was the extent of the admissible medical testimony. He was given the added fact that the fireman did not discern any response by McDonald, and to obey the rule would require a response. Why did the fireman fail to observe response? That, of course, was either because there was a response and the fireman did not observe it, for various reasons, or because McDonald made no response. Dr. Ogilvie immediately says from this fact of non observance by the fireman, there was no response and that no response creates in his mind the conclusion that McDonald was mentally incompetent. What medical

basis is there for that conclusion? There is nothing contained in the autoptical report which shows it. There is just the fact of no response and a rule requiring response. From the facts it is just as reasonable to say that McDonald simply did not respond because he did not want to or because he was otherwise engaged. As between these reasons, and others that could be suggested, there is no basis medically or otherwise for choosing the one that Dr. Ogilvie chose, thereby giving it the dignity of expert testimony.

As a matter of fact, Engineer McDonald had not been acting as he should under the rules in connection with any of the signals passed. It appears that the fireman wondered why McDonald was not calling out the aspect of the signals. All he would reply is "I got her," and the rules required him to call the aspect of the signal.

We believe that a proper consideration of this question discloses that it is based solely and absolutely upon the proposition that McDonald did not respond. None of the other facts therein set forth could have any possible bearing upon the conclusion reached and there is nothing to show in the autopsy how long it was before the wreck when McDonald suffered the heart attack. One can, of course, close his eyes to this situation, but if he ever looks it squarely in the face, he can reach no other conclusion but that this question was based upon a matter of common knowledge and that to permit an expert to lift it out of that field and state it as a medical argument to bolster appellee's position is highly prejudicial to the rights of appellants. We submit that the Court should reanalyze this question and the answer of Dr. Ogilvie and declare the

prejudicial effect of this inadmissible testimony on a vital issue of the case.

POINT V.

THIS COURT ERRED IN NOT REVERSING THE JUDGMENT HEREIN BECAUSE OF THE IMPROPER METHOD USED BY THE TRIAL COURT IN SELECTING THE JURY PANEL.

Appellants, by their motion for new trial, charged that the trial court improperly and unlawfully selected the jury panel in this case. The matter was fully presented to the trial court by affidavits and testimony. The trial court upon full hearing decided the question on the merits and denied the motion for a new trial. This Court now holds that the trial court should not have considered the question. That issue was not properly raised on this appeal. Appellants appealed from the judgment and appellee made no cross appeal or cross assignments of error. Therefore, the trial court having considered the matter on its merits, this Court on appeal should likewise consider it on its merits.

The fact that the trial court did consider the questioned propriety of the selection of the jury upon its merits is analogous to the situation where a trial court considers and entertains a petition for a rehearing on its merits. See *Bowman v. Lopereno*, 311 U.S. 262; *Pfister v. Northern Ill. Finance Corp.*, 317 U.S. 144. These cases hold that if the court considers the merits of a petition for rehearing not timely filed, affect will be given to such petition in extending the time for appeal. In view of the fact that the trial court entertained and considered the amended motion for a new trial and in particular the assigned

ground relating to the manner of selection of the jury panel, and did not grant the motion to strike these portions of the motion and no appeal having been taken from such ruling, this Court is precluded from holding that the trial court was not justified in considering and disposing of this matter on its merits and for lack of cross appeal or cross assignment is likewise precluded from holding that the trial court erred in entertaining and deciding the amended motion for a new trial on its merits.

The motion for a new trial was filed within time and then after the expiration of the time for filing said motion it was amended. This amendment was made before the motion was heard. The trial court at the hearing considered the grounds contained in the motion as originally filed and as amended. There is no limitation in the rules as to amendment of such motion but certainly when the amendment is made before hearing thereon and no prejudice is shown, such amendment may be properly considered by the trial court. In any event the matters added by amendment could be considered as particularizing the general ground contained in paragraphs 4 and 16 of the original motion (R. 18, 19) to the effect that there was irregularity in the proceedings of the Court and jury and that the Court ought to grant a new trial in the exercise of its inherent power to prevent injustice and to secure to all litigants a fair and impartial trial. Such amendment was allowed in *Alcaro v. Jean Jordeau, Inc.*, 3 F.R.D. 61.

This Court does not expressly determine whether or not the method of selecting the jury in this case was proper and in accord with the requirements of *Thiel v. Southern Pacific*, 328 U.S. 217, yet it does hold expressly that there

was no abuse of discretion in denying the motion for a new trial on this ground.

The Supreme Court of the United States in *Thiel v. Southern Pacific Co.*, 328 U.S. 217, stated that the American tradition of trial by jury contemplates an impartial jury drawn from a cross-section of the community. It held that prospective jurors should be selected by court officials without systematic and intentional exclusion of any particular group or groups and that recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. It is inconceivable that a rank and flagrant violation of this rule so clearly laid down by the Supreme Court can be revealed as it has been here and yet supported by a holding that there was no abuse of discretion in refusing to grant a new trial on such showing. It should be determined whether or not the jury was improperly selected. If the jury was improperly selected, there can be no question that the trial court abused its discretion by denying the motion for a new trial. Any other holding would effectively destroy the rule announced by the Supreme Court of the United States in the *Thiel* case. It would be within the discretion of the trial court to say whether or not a new trial should be granted even though a violation of the rule announced in the *Thiel* case was revealed. The position of the trial court could always be upheld on the theory that there could be no abuse of discretion in denying a party his constitutional right to a jury trial. This Court does not expressly determine whether or not there was an improper method used in the selection of a jury, but merely sets forth what the rules are and then says there was no abuse of discre-

tion by the trial court here. We submit that this matter should be reconsidered by this Court and a determination made as to whether or not improper method was used in the selection of the jury under the principles laid down in the brief of appellants heretofore filed. Appellee did not at any time attempt to uphold the method of selecting the jury panel adopted and followed in the District Court for the District of Utah. Its failure to do so is understandable for the very simple reason that the selection was contrary to the rule announced in the *Thiel* case and appellee's only possible escape is that the matter was not raised in time.

We have pointed out that this does not help appellee here because the timeliness of the amended motion for a new trial is not before this Court and the question was considered on its merits by the trial court.

CONCLUSION

We respectfully submit that this Court has failed to follow the Utah law and statutes in its determination of the nature and character of appellants' cause of action; that it has unduly extended the force and effect of the Hepburn Act and the conditions attached to the free pass here involved; that by its opinion it has taken from appellants property without due process of law and by its decision has placed the matter of appellants constitutional right to a jury trial within the discretion of a trial court, and has held that even though appellants have been denied

such right, the trial court did not abuse its discretion in defeating appellants' right to a jury trial according to the American tradition.

Respectfully submitted,

PARNELL BLACK
B. E. ROBERTS
CALVIN W. RAWLINGS
H. E. WALLACE
530 Judge Bldg.
Salt Lake City, Utah
Attorneys for Appellants

CERTIFICATE OF COUNSEL

COMES NOW Parnell Black, and says that he is one of the attorneys for Jackie Packer Francis, Dennis Ray Francis, and James Brent Francis, minors, by and through their general guardians, Ray E. Francis and Virgil O. Packer, plaintiffs and appellants in this case, and he hereby certifies that the foregoing petition is well founded and is not made for the purpose of delay, and that the decision of the court in this case is erroneous and that said cause ought to be re-examined and re-heard by this court to prevent and obviate a miscarriage of justice.

PARNELL BLACK
Counsel for Appellants.

Order Denying Petition for Rehearing

Forty-ninth Day, May Term, Wednesday, August 20th, A. D. 1947. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the petition of appellants for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition for rehearing be and the same is hereby denied.

On August 27, 1947, an order was entered staying the mandate for a period of thirty days under provision of paragraph 3 of rule 28.

Clerk's Certificate.

United States Circuit Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the designated transcript of the record from the District Court of the United States for the District of Utah, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 3424, wherein Jackie Packer Francis, a minor, et al. were appellants, and, Southern Pacific Company, a corporation, was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Ap-

peals for the Tenth Circuit, at my office in Denver, Colorado, this 9th day of September, A. D. 1947.

(Seal, U. S. Circuit Court of Appeals, Tenth Circuit)

ROBERT B. CARTWRIGHT,
Clerk of the United States Circuit Court of Appeals, Tenth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 8, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 14 1947
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 400

JACKIE PACKER FRANCIS, A MINOR, DENNIS RAY FRANCIS, A MINOR, AND JAMES BRENT FRANCIS, A MINOR, BY AND THROUGH THEIR GENERAL GUARDIANS, RAY E. FRANCIS AND VIRGIL O. PACKER,

Petitioners,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

PARNELL BLACK,
Counsel for Petitioners.

B. E. ROBERTS,
CALVIN W. RAWLINGS,
HAROLD E. WALLACE,
WAYNE L. BLACK,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 400

JACKIE PACKER FRANCIS, A MINOR, DENNIS RAY FRANCIS, A MINOR, AND JAMES BRENT FRANCIS, A MINOR, BY AND THROUGH THEIR GENERAL GUARDIANS, RAY E. FRANCIS AND VIRGIL O. PACKER,

Petitioners,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petition of Jackie Packer Francis, Dennis Ray Francis and James Brent Francis, minors, by and through their general guardians, Ray E. Francis and Virgil O. Packer, respectfully shows:

Summary and Short Statement of Matter Involved

The United States Circuit Court of Appeals, Tenth Circuit, contrary to the provisions of Section 721, Revised

Statutes, Title 28, U. S. C. A., Section 725, and the decision of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, denied petitioners the right to have the issues of their cause decided and determined in accordance with the laws of the State of Utah in an action commenced in their behalf to recover damages for the wrongful deaths of their parents which occurred within the State of Utah.

The Circuit Court, contrary to the provisions of the Constitution and statutes of the State of Utah and the decisions of its highest court interpreting, construing and applying the same, held that it was essential to the maintenance of petitioners' wrongful death action that it be made to appear that their deceased parents could have successfully maintained an action to recover damages for the personal injuries caused by the wrongful act of respondent had death not resulted therefrom.

The Circuit Court held that contractual conditions attached to a free pass issued pursuant to the Hepburn Act, 49 U. S. C. A., Section 1(7), to which petitioners were not parties, could be employed to govern, control and determine the nature and extent of their rights in an action for wrongful death created by and arising under the laws of the State of Utah.

The Circuit Court by its decision herein has deprived petitioners of property without due process of law in violation of the Constitution of the United States.

The Circuit Court, contrary to the law as declared by this Court in *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 66 S. Ct. 984, has denied petitioners the right of trial by a jury drawn from a cross-section of the community as guaranteed to them by the Constitution of the United States.

Petitioners' action was commenced in the United States District Court for the District of Utah to recover damages for the wrongful deaths of their parents. Mr. and Mrs. Francis, while traveling on passes issued to them by the respondent under the Hepburn Act, 49 U. S. C. A., Section 1(7), were killed in a collision between sections one and two of respondent's regular westbound passenger train No. 21 near Bagley, Utah, on the early morning of December 31, 1944. The trial court, over petitioners' objection and contrary to the laws of the State of Utah, and to Section 721, Revised Statutes, and Title 28, U. S. C. A., Section 725, and the decision of this Court in the case of *Erie Railroad Co.* v. *Tompkins, supra,* refused to submit the issue of respondent's negligence in the operation of its trains to the jury. This ruling was affirmed by the United States Circuit Court of Appeals, Tenth Circuit.

The train collision causing the deaths of petitioners' parents having occurred in the State of Utah, the law of Utah is controlling. *Gerling* v. *Baltimore & O. R. Co.*, 14 S. Ct. 533, 151 U. S. 673, 38 L. Ed. 311; *Northern Pacific Ry. Co.* v. *Meese,* 36 S. Ct. 223, 239 U. S. 614, 60 L. Ed. 467; *Old Dominion S. S. Co.* v. *Gilmore,* 28 S. Ct. 133, 207 U. S. 398, 52 L. Ed. 264; *Nichols* v. *Atchison etc. R. Co.*, 286 F. 1, *affirmed* 44 S. Ct. 353, 264, U. S. 348, 68 L. Ed. 720; *Moss* v. *Pennsylvania R. Co.*, 146 F. (2d) 673, *Cert. den.* 65 S. Ct. 1200, 325 U. S. 861, 89 L. Ed. 1982; *Dawson* v. *McWilliams,* 146 F. (2d) 38; *Roth* v. *Swanson,* 145 F. (2d) 262; *Carter* v. *Kurn,* 127 F. (2d) 415; *Mann* v. *Minnesota Electric Light Co.*, 43 F. (2d) 36.

In determining the nature, characteristics and extent of petitioners' rights herein, the District Court and the Circuit Court of Appeals refused to follow the law of Utah as

provided in Section 5, Art. XVI, Constitution of Utah, and Section 104-3-11, Utah Codes Annotated, 1943, and as declared and established by the Utah Supreme Court in *Halling* v. *Industrial Commission of Utah*, 71 Utah 112, 263 Pac. 78; *Mason* v. *Union Pacific R. Co.*, 7 Utah 77, 24 P. 796; *Morrison* v. *Perry*, 104 Utah 151, 140 P. 2d 772.

From the affidavits filed in support of the motion for new trial it was conclusively shown that the District Court discriminated against members of organized labor in the selection of jurors. In the year 1944 three were called for jury service from a Union membership of 32,129; in 1945 four were called from a membership of 31,156; and in 1946 from a membership of 31,389 four were called. During these years a total of 826 were called for service, and amongst those were twenty-nine bankers, eighteen insurance men and fifty-two merchants. The adverse ruling of the District Court on this issue was affirmed by the Circuit Court of Appeals. This ruling effectively deprived petitioners of the right of trial by a jury drawn from a cross-section of the community, guaranteed them by the Constitution of the United States as defined by this Court in the case of *Thiel* v. *Southern Pacific Co., supra.*

Jurisdictional Statement

The jurisdiction of this Court to review the decision of the United States Circuit Court of Appeals, Tenth Circuit, is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Title 28, U. S. C. A., Section 347(a), for the following special and important reasons:

(a) The Circuit Court of Appeals by its decision herein in an action arising under and controlled by the Constitu-

tion and statutes of the State of Utah, has decided an important question of law in conflict with applicable and controlling decisions of the Supreme Court of the State of Utah.

(b) The Circuit Court of Appeals by its decision has deprived petitioners of property without due process of law in violation of the Constitution of the United States.

(c) The Circuit Court of Appeals by its decision has decided an important question of law in a manner contrary to the decisions of this Court in the case of *Thiel* v. *Southern Pacific Co., supra.*

Opinion of the Court Below

The opinion of the Circuit Court of Appeals, Tenth Circuit, dated July 9, 1947, is not yet officially reported but may be found in the record commencing at page 273. The case on appeal was heard by Judges Bratton, Huxman and Murrah. On August 11, 1947, and within the time permitted by the Rules and special order of the Tenth Circuit Court of Appeals, petitioners filed their Petition for Rehearing and Brief in Support Thereof. A true copy of said petition and brief may be found in the record commencing at page 283. The petition for rehearing was denied on August 20, 1947 (R. 329). This petition for certiorari was filed on the 14th day of October, 1947.

Questions Presented

The questions presented are:

1. Whether or not the United States Circuit Court of Appeals, Tenth Circuit, in an action which arose under and was governed by the law of the State of Utah, properly construed and applied Section 5, Article XVI of the Con-

stitution of the State of Utah and Section 104-3-11, Utah Code Annotated, 1943, as interpreted and construed by the Supreme Court of the State of Utah in *Halling* v. *Industrial Commission of Utah, supra; Mason* v. *Union Pacific R. Co., supra;* and *Morrison* v. *Perry, supra.*

2. Whether or not the Circuit Court of Appeals by its decision herein has wrongfully deprived petitioners of property without due process of law in violation of the Constitution of the United States.

3. Whether or not the Circuit Court of Appeals by its decision herein has affirmed and approved an unwarranted discrimination against members of organized labor in the selection of the jury panel by the Federal District Court of Utah.

4. Whether or not the practice and method of selecting the jury panel as followed in the trial court had the effect of depriving petitioners of trial by a jury drawn from a cross-section of the community as guaranteed them by the Constitution of the United States.

Reasons Relied On for Allowance of Writ

The Circuit Court of Appeals has decided an important question of law arising under and controlled by the statutes and constitutional provisions and decisions of the Supreme Court of the State of Utah in a way not in accord with the applicable decisions of the Supreme Court of the State of Utah and this Court.

In determining the nature and extent of petitioners' rights in an action for the wrongful deaths of their parents which occurred within the State of Utah, the Circuit Court of Appeals declared: *"It is essential to the maintenace of the action that the wrongful act or default be of such character that the decedent could have maintained an action to*

recover damages for his injury if death had not ensued" (R. 275). This holding is contrary to and in conflict with the decisions of the Supreme Court of Utah in *Halling* v. *Industrial Commission of Utah, supra,* and to the provisions of Section 5, Article XVI, Constitution of Utah, as amended, and to Section 104-3-11, Utah Code Annotated, 1943. In the *Halling* case, the Supreme Court of Utah declared: *"We are therefore of the opinion that the wife and minor children of Mariner Halling did not, and could not, derive any claim for compensation through the deceased, but their claim is separate and independent of any claim deceased may have had during his lifetime"* (R. 304). The Utah Court held that Halling during his lifetime was powerless to encumber, restrict, abrogate or limit the right of action for wrongful death created by the Constitution and statutes of the State of Utah for the benefit of his dependent heirs, and that the right of heirs to recover for the wrongful deaths of ancestors is not the result of contract but a constitutional right which cannot be denied, and that any wrongful abrogation of this right constitutes a deprivation of property without due process of law. See 71 Utah, pp. 121, 122.

By its decision herein the Circuit Court of Appeals employed a contractual condition to which petitioners were not parties to defeat their action to recover for the wrongful deaths of their parents.

The Circuit Court of Appeals in its decision approved and affirmed an unwarranted practice followed by the Court in the selection of juries the effect of which was to deprive petitioners of their right of trial by a jury selected from a cross-section of the community contrary to the decision of this Court in *Thiel* v. *Southern Pacific Co., supra.*

It is therefore essential that a Writ be granted in order to determine the important questions of law above referred to and to likewise determine important questions relating

to the construction, interpretation and application of the Federal Statute known as the Hepburn Act, 49 U. S. C. A., Section 1(7) and specifically to determine whether or not Congress in the enactment of the Hepburn Act intended to limit, modify, control or abrogate rights of action for wrongful death, created by the constitutional and statutory provisions of the various States.

If it should be determined that Congress by the enactment of the Hepburn Act did intend to limit, modify, control or abrogate such rights of action, it should be determined whether Congress intended to permit railroad companies and their employees to limit, modify, control or abrogate such rights of action by the simple expedient of attaching contractual conditions to passes issued to employees pursuant to the Act. If it should be determined that Congress intended either or all of the results above mentioned, then it should be determined whether or not Congress has acted in excess of its constitutional grant of authority.

Prayer

WHEREFORE, your petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals, Tenth Circuit, commanding said Court to certify and send to this Court the transcript of the record in the case entitled Jackie Packer Francis, a minor, Dennis Ray Francis, a minor, and James Brent Francis, a minor, by and through their general guardians, Ray E. Francis and Virgil O. Packer, Appellants, vs. Southern Pacific Company a Corporation, Appellee, No. 3424, including also the proceedings in said United States Circuit Court of Appeals to the end that said cause may be reviewed and determined by this Court and the judgment of the United States District

Court, for the District of Utah, and the judgment of the United States Circuit Court of Appeals, Tenth Circuit, be reversed and the cause remanded for further proceedings according to law.

JACKIE PACKER FRANCIS,
A Minor,
DENNIS RAY FRANCIS,
A Minor, and
JAMES BRENT FRANCIS,
A Minor, by and Through
Their General Guardians,
RAY E. FRANCIS *and*
VIRGIL O. PACKER,
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Of Counsel.

Salt Lake City, Utah.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 400

JACKIE PACKER FRANCIS, A MINOR, DENNIS RAY FRANCIS, A MINOR, AND JAMES BRENT FRANCIS, A MINOR, BY AND THROUGH THEIR GENERAL GUARDIANS, RAY E. FRANCIS AND VIRGIL O. PACKER,

Petitioners,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the Circuit Court of Appeals, Tenth Circuit, dated July 9, 1947, is not yet officially reported but may be found in the record commencing at page 273.

Grounds on Which Jurisdiction of Supreme Court of the United States Is Invoked

The judgment of the Circuit Court of Appeals, Tenth Circuit, was made and entered on the 9th day of July, 1947 (R. 280). Petition for Rehearing was denied on August 20,

1947 (R. 329). Petition for Writ of Certiorari was filed on 14th day of October, 1947. The judgment of the Tenth Circuit Court of Appeals is based upon its application of the United States Statute commonly called the Hepburn Act, 49 U. S. C. A., Section 1(7) (Feb. 4, 1887, c. 104, Sec. 1, 24 Stat. 379; June 29, 1906, c. 3591, Sec. 1, 34 Stat. 584; Apr. 13, 1908, c. 143, 35 Stat. 60; June 18, 1910, c. 309, Sec. 7, 36 Stat. 544; May 29, 1917, c. 23, 40 Stat. 101; and Feb. 28, 1920, c. 91, Secs. 400-403, 41 Stat. 474-479), and Section 5, Article XVI of the Constitution of the State of Utah, and Section 104-3-11, Utah Code Annotated, 1943. The jurisdiction of the Supreme Court of the United States is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Title 28, U. S. C. A., Section 347(a).

Statement of the Case

This action was instituted in the District Court of the United States, for the District of Utah, Central Division, to recover damages for the wrongful death of petitioners' parents. The jury returned verdicts in favor of respondent and judgment was immediately entered thereon (R. 16).

Jack R. Francis, a conductor and brakeman in the employ of respondent, and his wife, Delphia Packer Francis, were killed as the result of a collision which occurred when the second section of respondent's westbound passenger train No. 21 ran into the rear end of the first section of said train near Bagley, Utah at about 5.14 A. M. December 31, 1944. Mr. and Mrs. Francis were occupying a pullman berth in the rear car of First 21. They were traveling on passes issued by respondent, containing the following conditions:

> "This free pass is not transferable, will be taken up and forfeited if presented or used by a person not designated on its face, and is subject to revocation at any time without notice. In its use the user assumes

all risk of injury to person or property and of loss of property whether by negligence or otherwise, and absolves the issuing company and its officers and employes from any liability therefor. Use hereof in violation of any law is prohibited."

The main line tracks in the vicinity of the accident are straight and extend almost due east and west. The movement of traffic over these tracks is controlled by block signals. The signals material here proceeding from east to west are numbered: 7659, 7649, 7639 and 7629. The point of collision was approximately 2458 feet west from Signal 7639; the distance between Signals 7649 and 7639 is 5688 feet, and between Signals 7649 and 7659, 4509 feet (R. 63).

Three westbound trains were involved in the accident.

At approximately 4:12 a. m., on December 31, 1944, respondent's westbound Freight No. First 581, a double header, departed from Ogden, Utah (R. 68). As First 581 proceeded into Bagley, Utah, all block signals ahead were observed to be in clear position displaying green (R. 68). Engine trouble developed while the train was moving between Signals 7639 and 7629 which necessitated a stop on the main line tracks, where the train remained until after the collision (R. 68, 69). Westbound passenger train, No. First 21, consisting of a locomotive and eighteen passenger cars (R. 64), departed from Ogden at 4:38 a. m. (R. 60). As it moved west the engineer, in accordance with his duty, watched the block signals and when the engine reached a point five or six car lengths from signal 7649, he observed it to be in stop position displaying red. He immediately made a heavy service application of the automatic air brakes which brought the train to a stop about midway between Signals 7649 and 7639 (R. 74, 75).

According to company operating rules, well understood by all enginemen it is the duty of the engineer and fireman to keep a sharp lookout for all controlling block signals and

whichever observes the signal first must at once call out its aspect. It is the duty of the other to repeat the call audibly. According to these rules a train must be brought to an immediate stop responsive to a block signal in stop position displaying red, or whenever the aspect of any signal is undiscernible to the crew when passed (R. 70). Block signals are relied upon to keep trains traveling in the same direction over the same tracks properly and safely separated. The three trains involved here were being operated over the same main line tracks in the same direction under the protection of block signals (R. 64, 74). These block signals are constructed on the overlap principle. The two signals immediately to the rear of any standing or moving train are actuated by it and will automatically assume a stop position and display red (R. 66).

When First 21 approached Block Signal 7649, that signal and Signal 7639 as well were in stop position displaying red (R. 75) being actuated by First 581 which was standing between Signals 7639 and 7629. This afforded approaching train No. First 21 all of the 5688 feet of distance between signals 7649 and 7639, within which to make a safe stop in addition to the space between signal 7639 and the rear end of First 581. Engineer Ware of First 21, after bringing his train to a stop, proceeded forward in accordance with the safety rules at a speed of from 8 to 12 miles an hour, keeping a close lookout ahead so that he could stop the train immediately if necessary. The flagman from the stalled freight train was at Signal 7639 when First 21 reached that point. He boarded the locomotive and the train proceeded westward until the markers of the caboose on the rear end of the freight train became visible. When the locomotive was about four or five car lengths from the rear of the caboose, the engineer made a move to apply the air brakes, but at that very instant Second 21 crashed into the rear of First 21 and the brakes of the latter train were at once set

automatically in emergency. About two car lengths of space separated the locomotive from the rear end of the stalled freight train when First 21 came to a final stop (R. 75, 76).

Second 21, consisting of a locomotive, 18 baggage cars, a boxcar and coach, left Ogden, westbound, at 4:50 a. m. McDonald was the engineer and Hardman the fireman (R. 83, 84). Just before arriving at Little Mountain which is to the east of Block Signal 7659, there was a slight application of the air brakes to slow the train down for the curve there, but the air brakes were kicked off again by McDonald as soon as the train got around the curve (R. 89). It was foggy and McDonald did not call out the aspect of Signal 7659 as required by the rules. Hardman could not see it and so informed McDonald. McDonald replied "O. K., I got her" (R. 86). McDonald's reply and conduct were in violation of Rule 294 (R. 132). When the engine passed Signal 7649, Hardman was unable to see it, and McDonald did not call its aspect. Hardman stated that he could not see the signal and McDonald again in violation of Rule 294 said "I got her" (R. 86). Block Signal 7649 at that time was in stop position displaying red, as it was when First 21 went by a few minutes earlier. This fact has always been admitted and accepted by all parties to this suit. In the vicinity of this block signal McDonald applied the air but the brakes were evidently released by him—otherwise the train would have been brought to a stop (R. 89, 90, 93). The train proceeded onward at an unreduced speed until it approached signal 7639 (R. 90). Hardman observed this signal in stop position displaying red and called out to McDonald that the signal was red and frantically proceeded to prepare the locomotive for the emergency (R. 87, 88). He did not know whether McDonald made any response to his call of the signal, but thought he did not (R. 87). Hardman's frantic and frenzied reaction

to the red signal to a great extent belied the inference of his testimony that this was the first red block passed by the train that he knew of. If Hardman had thought that this was the first red block passed he would have known that there was no danger to be encountered within the mile of space between it and the next one to the west, and that the train could be brought to a stop from a speed of 65 miles an hour within half of that distance. But what did he do? He frantically proceeded to cut the fire, open the blower, cut the water pump and to do everything else to prepare the locomotive for the catastrophe which he evidently believed was about to overtake them. He paid no attention to McDonald and of course did not know whether the engineer made any response or not.

It is interesting to compare Hardman's reaction to his observance of Block Signal 7639 in stop position and that of the engine crew in First 21 when Block Signal 7649 was observed to be in the same position. Engineer Ware merely shut off the throttle and made a heavy service application of the automatic brakes. The train came to a stop midway between 7649 and 7639 and then proceeded on at a reduced speed in accordance with the rule (R. 75-77). Not so with Second 21. The very conduct of Hardman shows more conclusively than any evidence which could be otherwise produced that he expected the locomotive to come into violent collision with the other train at once and perhaps before he could get the fire shut off. He knew that there was no mile of clear tracks ahead. The work of preparing the locomotive for the impending catastrophe did not require more than ten seconds and Hardman then observed the markers on the rear of First 21 and the crash came (R. 88).

The most serious contention made by respondent was that McDonald was not negligent for the reason that he was either dead or incapacitated at the time Second 21 passed the second red block. Petitioners contended in the trial

court and in the Circuit Court of Appeals and still contend that even conceding this point, which they most certainly do not, they should still prevail even on the theory submitted to the jury. It is firmly established by undisputed evidence that McDonald failed to take action to stop the train when Signal 7649 in stop position displaying red was reached as required by the most compelling and inflexible rule of railroading, namely, the rule which requires an immediate stop in obedience to the command of a red block (R. 66, 67, 70, Rules 293, 294, 505, 509J, 509F, 509K—R. 132-133). That McDonald failed in the performance of this imperative duty is clearly indicated by his "I got her" response to Hardman's report that he could not see the signal. McDonald "got her" and the signal was red. Certain it is that he was alive at that point and presumably capable of setting the air. That he was physically capable of complying with the command of the red block when the train passed Signal 7649 is fully revealed by Hardman's testimony. He stated at Record 89 and 90 that soon after this block was passed McDonald applied the air brakes and then released them.

"Q. Now, proceeding there right on to the point of impact, was that air applied again?

A. Yes, sir.

Q. And, who applied it?

A. Mr. McDonald.

Q. Can you state approximately where that took place?

At the signal, block signal in between Little Mountain and Bagley.

Q. Now, you have stated there are three signals there?

A. Yes, sir.

Q. Can you state approximately where that would be in relation to these signals?

A. I would say it was almost the middle signal.

Q. That would be for the purpose of discussing, Signal 7649.

A. Yes, sir; to my knowledge.

Q. Was the air-brake released after that?

A. It presumably was, otherwise we would have stopped."

It thus appears that McDonald's failure was not in neglecting to apply the brakes when the train passed the first block signal in stop position displaying red, namely 7649, but in releasing the brakes after setting them, and that if he had not released these brakes the train would have been brought to a stop short of collision. It is difficult to conceive of conduct more worthy of designation as wilful and wanton than that shown by this testimony.

In support of the contention that McDonald was dead when the train reached and passed Block Signal 7639, respondent offered in evidence the testimony of Drs. Frank B. Queen and Orin A. Ogilvie. Dr. Queen performed an autopsy on McDonald's body shortly after his death (R. 160), and stated it to be his opinion that the cause of death was coronary occlusion and heart failure. Neither of the doctors were able to give an opinion supported by their findings or the anatomical report except that McDonald was dead when the steam from the broken pipes in the cab of the locomotive reached his body. They were unable to state whether he died a second or any other length of time prior thereto. Queen testified that McDonald could have suffered from such fright or shock upon suddenly realizing that the collision was certain as to bring on the fatal heart attack. He also stated that such fright could have aggravated the existing heart condition to the point of death.

Petitioners seriously contend that any inference which might be drawn from the doctors' testimony to the effect that McDonald was either dead or incapacitated when Second 21 passed Signal 7639 was completely dissipated and de-

stroyed by other testimony, testimony which proved beyond peradventure that McDonald was not only alive when Block Signal 7639 was reached but that he set the air brakes on Second 21 at that time or shortly thereafter.

Conductor Welch (R. 118), head brakeman Russell (R. 95), rear brakeman Altman (R. 106), and Express Messenger Cook (R. 127) were riding in the rear car of Second 21 as that train proceeded westward from Ogden. Each of these men experienced and observed the effects of a heavy application of the air brakes on the train some twelve seconds at least before the crash occurred.

Conductor Welch:

> "The first application of the brakes that I noticed after we left Ogden was in the vicinity of the wreck at Bagley. * * *" (R. 118). "I was sitting near the middle of the car with my feet over on one seat and sitting in the other with a clipboard in my hand writing, doing my book work. There was a heavy application of the air and I grabbed my right-hand grip of the seat and held on, and after a short period of time there was three distinct and separate lunges forward. * * *" (R. 119).

Head Brakeman Russell:

> "The air was applied with a heavy service application" (R. 95, 96).

Rear Brakeman Altman:

> "* * * I was shifting the aluminum cup from hand to hand; it was still too hot to drink when the brakes applied * * *. I satisfied myself we were coming to a stop and I put the cup of coffee on the seat in front of me and stood up and reached for my coat and the shock came" (R. 107).

Express Messenger Cook:

> "* * * And while I was writing, I felt this application of air and heard it and I stopped writing and

glanced out the window expecting to see some sort of settlement, I suppose, lights of some kind, because I expected us to come to a stop. And as I watched out the window a red flare passed and soon after we passed it we made the first impact" (R. 127, 131).

After the application of the brake power was first felt the two brakemen waited for a moment or two to determine whether or not the train was going to be stopped or merely slowed down, and reaching the conclusion that it was going to be stopped they commenced preparations for the performance of their duties and were so engaged at the time of the collision. Russell stood up in the aisle, reached for his coat and was putting it on when the first shock came (R. 86). Altman had poured coffee from his thermos bottle into a cup and because of the heat was passing the cup from one hand to the other when he felt the application of the air brakes. He paused a moment or so to determine whether or not the train was going to be brought to a complete stop, decided that it was, set his cup down, stood up and was standing in the aisle near Russell when the first shock came (R. 107). Altman was personally interested in determining whether or not the train was going to be stopped, if merely slowed down it would be Russell's duty to make the check, if brought to a complete stop it would be his duty to dismount and proceed back to protect by flagging (R. 107). He stood up in the aisle when he finally became convinced that the train was to be stopped and not merely slowed down (R. 107).

Cook estimated the amount of time elapsing between the application of the air brakes and the crash as being something less than a minute—perhaps about a half minute (R. 128).

Russell and Altman, at a hearing held shortly after the disaster, were timed while they reenacted the movements made by them between the application of the brakes and

the first shock. The elapse of time so determined was approximately twelve seconds (R. 96, 107). This first shock caused Cook to be pushed down into the seat (R. 127), it knocked Russell to the floor (R. 96), and caused Altman to be thrown violently against Russell and into the seat (R. 107). Then came the second shock which thrust Cook onto the floor between the seats (R. 107), it had no particular effect on Russell because he was already on the floor (R. 96), but knocked Altman down (R. 108). All of these men experienced a third shock when the car in which they were riding finally came to rest (R. 96, 108, 127). Conductor Welch testified that at the time of the three separate shocks, or lurches as he described them, he was holding onto the seat and they had no particular effect on him (R. 119).

After the cars came to rest, it was discovered that the first nine cars immediately behind the engine on Second 21 were turned over and pushed off the right of way. The tenth car was standing upright and completely derailed, the forward trucks only of the eleventh car were derailed. The remaining nine cars were still on the tracks (R. 117) firmly wedged against the wreckage ahead. The engine of Second 21 had crashed into the rear car of First 21, the car in which Mr. and Mrs. Francis were riding (R. 114). At least two cars in First 21 were telescoped (R. 115). Fifty people were killed, eighty-five injured.

Simon Morton Welsh, a conductor and brakeman of many years' experience, was called as an expert witness by petitioners. He testified that a sudden application of automatic air brakes in emergency on a passenger train traveling at a speed of from 60 to 65 miles per hour would not produce any perceptible shock whatsoever due to the train's momentum (R. 151, 152). He further testified that there would be approximately 7 feet of slack in a 20 car passenger train (R. 148) and that if such a train while traveling at a speed of 60 miles an hour or thereabouts should collide with

a standing or moving train the slack would run in, in not to exceed one-tenth of one second (R. 153). He stated that in his opinion the shock caused by a rear-end collision between a train traveling between 40 to 65 miles per hour and one either stopped or moving slowly in the same direction would be entirely dissimilar and unlike the retarding effect produced by the setting of brakes in emergency on a train traveling 60 to 65 miles per hour. It was his opinion that such a collision would produce at once a severe shock, a shock similar to that which the witnesses described as having occurred some twelve seconds after they experienced the effects of the application of the air brakes. He testified that even though a collision such as that which caused the deaths of petitioners' parents would undoubtedly set the air brakes in emergency on the trains involved, the retarding force and effect of such brake application would be entirely dissipated by the tremendously greater retarding force and power of the collision and would be entirely imperceptible to people riding on the approaching train (R. 153). This testimony is understandable. The ratio of the retarding power and corresponding perceptible effect produced by the application of train brakes would depend on the weight of the train and its momentum. The greater the train speed the less the retarding power of the brakes and perceptible effect produced by their application. The application of automatic train brakes in emergency on a slowly moving train by overcoming at once practically all of the train's momentum could well produce a shock of sufficient severity to knock trainmen down and do great damage to train equipment where the same application of brakes on a train moving in excess of 60 miles per hour would produce no perceptible shock or damage whatsoever. Not so with a collision. It is submitted that the speed and momentum of the trains involved in a collision would determine the destructive force, effect and shock produced and

caused thereby. A collision between trains moving between one to two miles per hour would likely not produce any considerable damage, but a collision occurring on a straight track between a train stopped or moving slowly and one approaching from the rear at a speed of from 40 to 65 miles an hour would be expected to cause great damage and destruction and likewise produce at once a severe shock throughout the whole length of the train, a shock sufficient to knock men down and to produce all of the results described by Altman, Russell and Cook. It would be strange indeed if the immediate effects of such collision were in all respects similar to the retarding effect produced by the ordinary application of air brakes. It would be most unusual if the effects were such that during the first twelve seconds after the occurrence men in the rear car of the speeding train could safely and without difficulty stand in the aisle, put on coats, pass a cup of coffee from hand to hand not knowing whether the train was going to be stopped or merely slowed down and then knocked flat by the first shock produced by the collision. It is submitted that immediately upon the occurrence of the collision in this case, the retarding force and effect of the automatic air brakes on Second 21, whatever it was, became insignificant and inconsequential and entirely submerged in the tremendously greater retarding force produced by the collision itself. The conclusion, therefore, seems irresistible that the sensations experienced by the four men in the rear car of Second 21 some twelve seconds prior to the first crash or shock could not have been caused by the collision between Second and First 21. They experienced the effects of the natural retarding force of normally applied brakes. It was conclusively established that the only possible manner in which the brakes on Second 21 could have been applied or set prior to the collision was by human intervention and the only person who had access to the brake setting mecha-

nisms was McDonald. It, therefore, follows from this proof that McDonald set the brakes on Second 21 after Block Signal 7639 was reached or passed.

Petitioner's complaint contained two counts, one based upon the failure of respondent to use ordinary care in the operation of its trains, the other charged gross negligence and wilful and wanton misconduct. Respondent pleaded as a defense to each of these counts the condition on the free pass. Petitioners moved to strike this defense as immaterial (R. 12). This motion was denied (R. 13). Petitioners requested the Court to instruct the jury that if respondent failed to exercise ordinary care in the operation of its trains petitioners were entitled to recover (R. 222). The Court refused to grant this request and petitioners duly excepted (R. 219, 220). Petitioners excepted to those portions of the Court's instructions which exonerated respondent from ordinary negligence (R. 220).

The Court, in submitting the issues to the jury, instructed in part as follows:

> "They were riding on a pass, a railroad pass issued by the defendant Southern Pacific Company. That pass recited and provided that the railroad company could not and would not be held liable for any negligence of its employes by which these plaintiffs might be injured.
>
> "Now, the Supreme Court of the United States has held that that waiver is valid and that when people sign such a waiver and ride on a pass containing it, they are not permitted to recover for just ordinary negligence.
>
> "So that this case has been submitted to you and will now be submitted to you upon the question of whether or not Mr. McDonald, the engineer on that second section that morning, was guilty as charged in the complaint in each case of wilful and wanton misconduct.

"Now I will read you a more lengthy and definite statement as to the definition of wilful and wanton misconduct but I will state now that it implies a mental state. Negligence—just ordinary negligence does not imply any mental purpose. It is just thoughtless carelessness. For instance, ordinary negligence is usually defined something like this: it is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under such existing circumstances would not have done. So there is not any wilfullness or wantonness involved in ordinary negligence.

"This pass which these people were using on that occasion exonerated and released the defendant company from that sort of negligence. It did not release them from wilful misconduct or wanton actions" (R. 207, 208).

The facts of this case, when viewed in the light of the controlling principles of law as announced by the Supreme Court of Utah in the case of *Halling* v. *Industrial Commission of Utah*, 71 Utah 112, 263 P. 78, clearly reveal the extent to which petitioners' rights have been violated.

Specification of Errors

The United States Circuit Court of Appeals, Tenth Circuit, erred:

1. In holding that under the law of the State of Utah it is essential to the maintenance of a wrongful death action that the act or default of the respondent be of such character that decedent could have maintained an action to recover damages for his injuries if death had not ensued.

2. In refusing to follow and apply the law of the State of Utah as declared and established by its highest court in this action which arose under and was controlled by the laws of the State of Utah.

3. In holding that the Utah Wrongful Death Statute, upon which this action is based, creates a survival action when the Supreme Court of the State of Utah has held that it creates a new and independent action in favor of the heirs of the decedent, an action over which decedent had no control and was powerless to in any way limit, settle, destroy, or abrogate.

4. In holding that the Hepburn Act, 49 U. S. C. A., Section 1(7), controlled the nature and effect of petitioners' rights in this wrongful death action which arose under the laws of the State of Utah.

5. In holding that the nature and extent of petitioners' rights in this action were dependent upon the effect given the contract entered into between respondent and its employee in connection with the issuance of free passes under the Hepburn Act by the Circuit Court.

6. In holding that respondent was insulated against the legal consequences of its negligence in the operation of its trains by the contractual provisions limiting liability contained in the pass because:

(a) The contractual provisions of the free pass do not purport to relieve respondent of liability in the event the user of the pass is killed.

(b) Petitioners were not parties to the contract set forth in the pass and were not bound thereby.

(c) The effect of the Court's holding is to deprive petitioners of property without due process of law in violation of the Constitutions of the United States and the State of Utah.

7. By holding in effect that a contract entered into by and between respondent and petitioners' ancestors in connection with a free pass issued to said ancestors pursuant to the Hepburn Act to which petitioners were not parties could

be so employed as to justify the deprivation of petitioners' property without due process of law contrary to the provisions of the Constitutions of the United States and the State of Utah.

8. In denying petitioners the right of trial by a jury drawn from a cross-section of the community as guaranteed to them by the Constitution of the United States.

Argument

Point I

Petitioners' Rights Were Created by the Laws of Utah and the Laws of Utah Are, Therefore, Controlling.

The train collision causing the deaths of petitioners' parents having occurred in the State of Utah, the Law of Utah is controlling. *Gerling* v. *Baltimore & O. R. Co.*, 14 Sup. Ct. 533, 151 U. S. 673, 38 L. Ed. 311; *Northern Pacific Ry. Co.* v. *Meese*, 36 Sup. Ct. 223, 239 U. S. 614, 60 L. Ed. 467; *Old Dominion S. S. Co.* v. *Gilmore*, 28 Sup. Ct. 133, 207 U. S. 398, 52 L. Ed. 264; *Vancouver Steamship Co.* v. *Rice*, 288 U. S. 445, 77 L. Ed. 885, 53 Sup. Ct. 420; *Nichols* v. *Atchison, etc., R. Co.*, 286 Fed. 1, *affirmed* 44 Sup. Ct. 353, 264 U. S. 348, 68 L. Ed. 720; *Moss* v. *Pennsylvania R. Co.*, 146 F. (2d) 673, *Cert. den.* 65 Sup. Ct. 1200, 325 U. S. 861, 89 L. Ed. 1982; *Dawson* v. *McWilliams*, 146 F. (2d) 38; *Roth* v. *Swanson*, 145 F. (2d) 262; *Carter* v. *Kurn*, 127 F. (2d) 415; *Mann* v. *Minnesota Electric Light Co.*, 43 F. (2d) 36.

In *Betts* v. *Southern Ry.*, 71 F. (2d) 787, the Court stated:

> "• • • there is no question but that all matters pertaining to the substantive right of recovery under a wrongful death statute, including the right to recover, the nature of the right, and the party in whom it is vested, are governed by the law of the state where the injury resulting in death occurred" (71 F. (2d) 789).

The legal principle above stated is firmly established in our jurisprudence and we have been unable to find any authority which declares or supports a contrary view. While there has never been any express or admitted contention made against this principle of law in any of the proceedings herein, it has never been recognized or given any force or effect whatsoever in determining the issues of this case. The trial court and the Circuit Court wholly ignored the Utah Constitutional and Statutory Law and controlling State decisions in reaching the conclusions and determinations which have resulted in the defeat of petitioners' cause up to this point.

The trial court refused to consider or give effect to Utah law in determining petitioners' motion to strike the contractual conditions attached to and made a part of the free pass pleaded by respondent as its chief defense to this action (R. 13). The trial court, contrary to the law of Utah, refused to instruct the jury that if defendant failed to exercise ordinary care in the operation of its trains, petitioners were entitled to recover (R. 219, 220, 222), but instructed that as matter of law respondent was completely exonerated from ordinary negligence by reason of the conditions attached to the free pass. The jury was instructed, contrary to Utah Law, that respondent could not be held liable unless found guilty of wilful and wanton misconduct (R. 207, 208).

The Circuit Court of Appeals refused to consider or give effect to Utah law when it declared as follows (R. 275):

> "And it is essential to the maintenance of the action that the wrongful act or default be of such character that the decedent could have maintained an action to recover damages for his injury if death had not ensued. While it is not a derivative action in the ordinary meaning of the term, recovery cannot be had unless the decedent could have recovered damages for his wrongful injury if he had survived."

In marshalling support for this statement of law, which was absolutely determinative of the issues of this case in the Circuit Court of Appeals, that court entirely overlooked the decision of the Supreme Court of Utah in *Halling* v. *Industrial Commission*, 71 Utah 112, 263 Pac. 78, where a contrary result was reached and declared. Ignoring the *Halling* decision, the Court placed reliance on the authority of *Northern Pacific Railway Co.* v. *Adams*, 192 U. S. 440, 24 Sup. Ct. 408, wherein this Court gave controlling effect to the law of the State of Idaho in a wrongful death action which arose under the laws of that State. The law of Idaho on this material subject is contrary to and at variance with the law of the State of Utah. Compare *Helgeson* v. *Powell*, 54 Idaho 667, 34 Pac. (2d) 957, and *Halling* v. *Industrial Commission, supra.*

The Circuit Court of Appeals also supported its holding by a citation of the following decisions of this Court: *Michigan Central Railroad Co.* v. *Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192; *Mellon* v. *Goodyear*, 277 U. S. 335, 48 Sup. Ct. 541; *Flynn* v. *New York, New Haven & Hartford Railroad Co.*, 283 U. S. 53, 51 Sup. Ct. 357. In these cases this Court declared, construed and applied the survival features of the Federal Employers' Liability Act in death actions arising under that Act and held that such actions are survival in character and not completely independent in nature as are wrongful death actions arising under Utah law.

The rulings of this Court in the *Mellon* case, *supra*, and *Flynn* case, *supra*, are based upon the following statement of law made by this Court in the *Vreeland* case, at page 196 of 33 Sup. Ct.:

> "But as the foundation of the right of action is the original wrongful injury to the decedent *it has been generally held that the new action is a right dependent*

upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury." (Italics added.)

This is contrary to the law of Utah as announced by its highest court in the *Halling* case, *supra.* The law of Utah being controlling herein, Revised Statutes, Section 721, 28 U. S. C. A., Sec. 725, *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, it is apparent that the Circuit Court committed error in its holding as above set forth.

Point II

Under Utah Law the rights of heirs in a wrongful death action are completely independent of any rights or privileges which decedent may have had or could have exercised during his lifetime. It is, therefore, immaterial to the maintenance of such action in Utah whether the wrongful act or default be of such character that decedent could have maintained an action to recover damages for his injuries if death had not ensued.

The inquiry of primary importance is, what are the legal aspects of the cause of action for wrongful death created by the Constitution and Statutes of the State of Utah as construed and interpreted by the decisions of its highest court? The Constitution provides:

> "The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law." Sec. 5, Art. 16, Constitution of Utah, as amended.

Prior to statehood the Statutes of the Territory of Utah provided as follows (Section 2961, Compiled Laws of Utah, 1888):

> "Whenever the death of a person shall be caused by wrongful act, neglect or default, *and the act, neglect or*

default is such as would, if the death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony."

The italicized portion of Section 2961 was eliminated from the Utah Statutes by the State Legislature in 1898 in the first revision of State Laws after statehood. Since that time the State Wrongful Death Statute has remained essentially in its present form.

Section 104-3-11, Utah Code Annotated, 1943.[1]

It will be observed that the State Legislature in 1898 eliminated from Utah Law the identical restrictive condition employed by the Circuit Court of Appeals in 1947 to defeat petitioners herein. The Legislature of Utah eliminated the restrictive condition "and the act, neglect or default is such as would if the death had not ensued have entitled the party injured to maintain an action. * * *" The Circuit Court declared "It is essential to the maintenance of the action that the wrongful act or default be of such character that the decedent could have maintained

[1] "Except as provided in chapter 1, of Title 42, when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death, or, if such person is employed by another person who is responsible for his conduct, then also against such other person. If such adult person has a guardian at the time of his death, only one action can be maintained for the injury to or death of such person, and such action may be brought by either the personal representatives of such adult deceased person, for the benefit of his heirs, or by such guardian for the benefit of the heirs as provided in the next preceding section. In every action under this and the next preceding section such damages may be given as under all the circumstances of the case may be just."

(Section 104-3-11, Utah Code Annotated, 1943.)

an action to recover damages for his injury if death had not ensued. * * * Recovery cannot be had unless the decedent could have recovered damages for his wrongful injury if he had survived."

The historical background of the Utah Law is most significant in any proper appraisement or construction of the Wrongful Death Law of the State. Utah's original Wrongful Death Statute, viz: Section 2961, Compiled Laws of Utah, 1888, was enacted by the Twenty-first Territorial Legislature in February, 1874. It became Section 1216, Compiled Laws of Utah, 1876 and remained as the law of the Territory until statehood, and, as State law until eliminated by the Legislature in 1898.

The Constitution of the State of Utah was adopted November 5, 1895. The Proclamation of the President of the United States admitting the State to the Union was issued January 4, 1896, upon which date the State Constitution became the paramount State law.

It is apparent that the provision in the Constitution guaranteeing the right of action to recover damages for injuries, resulting in death against abrogation was in conflict with the pre-existing territorial statute which provided that such actions could only be maintained where the wrongful act or default was of such character that the decedent could have maintained an action to recover damages for his injury if death had not ensued.

The State Legislature no doubt recognized this conflict and revised the statute in such way as to bring it into harmony with the constitutional provision. It is reasonable to assume that the Legislature recognized the necessity of clarifying the law by enacting statutory provisions which would give full force and effect to the letter and spirit of the constitutional provisions freeing and liberating the right of action for wrongful death from any danger of abrogation from any source whatsoever.

It seems apparent that the complete abridgement of the power to abrogate is in conflict with the existence of such power wherever it may reside. The declaration in the Constitution is plain, simple and unambiguous. There is no limitation of the guarantee therein contained to be found in the laws of Utah nor in the decisions of its Supreme Court.

"The right of action to recover damages for injuries resulting in death shall never be abrogated" declares the Constitution of the State of Utah. It shall never be abrogated by the Legislature of the State, neither shall it be abrogated by any contract, agreement, settlement, release or by any other conduct of decedent during his lifetime either before or after suffering the injuries causing death. There is no justification for an assumption that the constitutional guarantee against the abrogation of this right extends only to the State Legislature. It is submitted that the extent of the guarantee is such as to free the right of action from the power of interference, limitation, settlement, compromise, release or abrogation by decedent during his lifetime acting on his own behalf or contractually with others.

In this case the Circuit Court of Appeals abrogated the right of action for wrongful death contrary to the Constitution of the State of Utah. It abrogated this right by decreeing a restrictive conditional limitation contrary to the expressed will of the Legislature of the State of Utah. Not only has the Circuit Court of Appeals refused to follow or consider Utah law but it has re-enacted restrictive and abrogating conditions stricken from the law of Utah by its Legislature.

Prior to statehood the Supreme Court of the Territory of Utah construed and applied the Wrongful Death Statutes as they then existed in the case of *Mason* v. *Union Pacific Railroad Company,* 7 Utah 77, 24 Pac. 796 (1890).

The territorial statutes contained the restrictive condition stricken out by the State Legislature in the revision of 1898. Mason was injured in a railroad accident, brought suit to recover for his injuries but died prior to trial. His personal representative having been substituted as party plaintiff sought to continue the action. The motion of the railroad company to dismiss was granted. The Court determined that the action created by statute for the benefit of the heirs was independent of any right which Mason may have possessed during his lifetime to recover compensation for his injuries. The Court held that defendant's wrongful act constituted the cause of action in favor of Mason while living, but that the statutory wrongful death action was based upon two facts, namely, the wrongful act and the death.[2]

The Court commented on the restrictive condition contained in the statutes at that time which was eliminated by the State Legislature in the revision of 1898.[3]

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[2] "The wrongful act caused the death of Mason but his death in turn must be regarded in a legal sense as causing the injury to the heirs." (7 Utah, 82.)

"* * * While the wrongful act of the defendant for the injuries which George S. Mason sued, invaded his rights, and the law gave him a right of action to redress the consequences of that invasion to him, that act did not in a legal sense invade the rights of his heirs, and therefore they had no wrong, from that act simply, to redress by an action. Their legal rights were not invaded until death ensued, and then the statute gave them instantly a right of action to redress the losses following that invasion of their rights. The wife or children do not succeed to the husband's or father's cause of action; that dies with him. But, immediately upon his death, a new cause of action arises in their favor. The statute then gives them a new cause of action. It does not revive or continue the husband's or father's cause of action." (*Mason* v. *U. P. Ry. Co.*, 7 Utah, 81.)

[3] "These sections give to the personal representatives or heirs a right of action against the person whose wrongful act or neglect causes the death of another, when the deceased, if he were living, could maintain one. If the person sustaining the direct injury from the wrongful act or neglect had a right of action for it, his heirs have one for their injury for his death caused by the same act or neglect." (*Mason* v. *U. P. Ry. Co.*, 7 Utah 77, 80.)

The Circuit Court of Appeals properly cited and relied upon the Utah cases of *Mason* v. *Union Pacific R. Co., supra; Halling* v. *Industrial Commission, supra;* and *Morrison* v. *Perry, supra,* to support the proposition that the Utah statute does not provide for the survival of a right of action, nor transfers a right of action from the decedent to his heirs, but creates a new and independent right of action in the heirs which did not exist at common law, an action separate and distinct from any which the decedent might have maintained for personal injuries had he survived. The court, however, erred in declaring as the controlling principle of law:

> "* * * *and it is* essential to the maintenance of the action that the wrongful act or default be of such character that the decedent could have maintained an action to recover damages for his injury if death had not ensued." (R. 300)

To support this proposition it became necessary for the court to ignore the Utah case wherein the identical question was decided and a contrary result reached. The court rested its holding on the authority of four cases from this Court: *Northern Pacific Railway Co.* v. *Adams,* 192, U. S. 440, 24 S. Ct. 408; *Michigan Central Railroad Co.* v. *Vreeland,* 227 U. S. 59, 33 S. Ct. 192; *Mellon* v. *Goodyear,* 277 U. S. 335, 48 S. Ct. 541; and *Flynn* v. *New York, New Haven & Hartford Railroad Co.,* 283 U. S. 53, 51 St. Ct. 357.

In neither of these cases did this Court purport to construe, interpret or apply the laws or statutes of any state or jurisdiction where the law, by enactment, construction or otherwise, is similar to the law in Utah on the question, Is it essential to the maintenance of a wrongful death action that the wrongful act or default be of such character that the decedent could have maintained an action to recover damages for his injury if death had not ensued?

In the case of *Northern Pacific Railway Co.* v. *Adams*, supra, this Court construed and applied the Idaho statute as being a survival statute and that construction was later adopted by the Idaho Supreme Court in *Helgeson* v. *Powell*, 54 Idaho 667, 34 Pac. 2d 957. That the Idaho law on this vital point is contrary to the law in Utah is clearly revealed by a comparison of the decisions in *Helgeson* v. *Powell* (Idaho), supra, and *Halling* v. *Industrial Commission* (Utah), supra. In *Michigan Central Railroad Co.* v. *Vreeland*, supra; *Mellon* v. *Goodyear*, supra, and *Flynn* v. *New York, New Haven & Hartford Railroad Co.*, supra, this court construed and applied the Federal Employers' Liability Act.

It is granted that under the law of Idaho as construed in the *Adams* case, and under the Federal Employers' Liability Act, as declared in the *Vreeland*, *Mellon* and *Flynn* cases, supra, the wrongful act or default must be such that the decedent could have maintained an action to recover damages for his injuries if death had not ensued. This, however, is contrary to the law in the State of Utah as provided in its Constitution, Section 5, Article XVI, and by its Statutes, Section 104-3-11, Utah Codes Annotated, 1943, and as announced by its highest court in *Halling* v. *Industrial Commission*, supra. Inasmuch as this vital difference in the legal aspects of the law was not recognized by the Circuit Court of Appeals, error was committed in affirming the judgment of the trial court. By affirming the judgment of the trial court the Circuit Court of Appeals nullified and held for naught important and valuable rights created by and under the laws and statutes of the State of Utah.

The delect which forms the basis of petitioners' action and the wrongful death took place and occurred in the State of Utah, and the Supreme Court of Utah in the *Halling* case, supra, having construed, applied and declared the law here

controlling, neither the Federal Employers' Liability Act nor the laws of the State of Idaho with respect to such action is material. *Erie Railroad Co.* v. *Tompkins*, supra.

Neither the Utah constitutional or statutory provisions nor the controlling decisions of its Supreme Court were considered or discussed in determining the crucial issue of this case. On September 9, 1925, Halling filed written application with the State Industrial Commission for compensation for injuries alleged to have occurred during the course of his employment on June 10, and August 8, 1925. Hearing was had on the application October 7, 1925 and the Commission found:

> "The applicant, on the 8th day of August, 1925, was not injured by reason of an accident arising out of or in the course of his employment while regularly employed by Henning Henderson." (71 Utah, 115)

In due time petition for rehearing was filed, and on March 9, 1926, it was heard, determined and denied by the Commission. No appeal was taken and the decision became final. On December 7, 1926 Halling died. On February 11, 1927 his wife, on behalf of herself and five minor children, filed an application with the Industrial Commission for compensation for the death of her husband, claiming that he died as a result of the injuries suffered by him in June and in August of 1925. Upon the hearing the Commission held and found:

> " * * * his wife and minor children, who claim, through him, could be in no better position before the commission than the deceased himself, and that therefore we are without jurisdiction to entertain this application, and that for this reason the case should be dismissed." (71 Utah, 117)

This holding of the commission is directly in line with the Circuit Court's declaration of law which furnished the foundation for the judgment of affirmance.

The Supreme Court of Utah stated as the controlling issue:

> "The sole question before us for review in this proceeding is whether or not the commission properly dismissed the application of Rose J. Halling and her minor children for the reasons stated by the commission in its decision." (71 Utah, 117)

In making its determination that the commission acted improperly, the Utah court placed the matter squarely upon the rights of Mrs. Halling and her children under the constitutional and statutory provisions hereinabove set forth.[4]

The defendant argued that inasmuch as an award under the Workmen's Compensation or Industrial Act is not made on the theory that a tort has been committed, but on the theory that the statute giving the award is read into and becomes a part of the contract of employment, the law pertaining to wrongful death actions as provided by the Consti-

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[4] "To determine this question it is necessary to briefly review the history of the laws of this state with respect to the rights of a surviving widow and minor children in a claim growing out of an injury resulting in the death of the husband and father." (*Halling* v. *Ind. Comm. of Utah*, 71 Utah, at page 117.)

"* * * Under the provisions of Article 16, Sec. 5 of the Constitution of Utah, both before and after the amendment, the right to recover damages for injury resulting in death can never be abrogated. The addition of the words, 'except in cases where compensation for injuries resulting in death is provided for by law,' gave to the Legislature the power to fix the amount of compensation, but not the power to entirely abrogate compensation. Any other construction would be contrary to the well-recognized rule of construction that when possible, effect should be given to all of the language used in a statutory or constitutional provision. It therefore is beyond the power of the Legislature to take from the dependents of an employee their claim against the employer, where such employee dies as the result of a wrongful injury by the employer. Under the provisions of article 16, sec. 5 of our Constitution, prior to the amendment, the Legislature could neither abrogate nor limit the amount of recovery in such case, and, after the amendment, the Legislature may provide for compensation, but may not take from the dependents their rights to some compensation."
(*Halling* v. *Ind. Comm. of Utah*, 71 Utah, at pp. 120-121.)

tution and statutes of the State of Utah was not applicable. The Court held to the contrary.[5]

The fact that Halling during his lifetime was denied compensation by the Commission was held to be immaterial and in no way binding upon his heirs. If the final denial of Halling's petition for compensation in no way embarrassed, abrogated, encumbered, modified or limited the right of his heirs to recover for his death, it is difficult to perceive how the contract entered into between Jack Francis and respondent prior to his injury and death could defeat, destroy and abrogate his children's cause of action for his wrongful death, the heirs of each founding their claims upon identical law.

The authorities relied upon by the Utah Supreme Court in the *Halling* case, supra, likewise support petitioner's contention.

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5 "• • • In either case the employee or his dependents are without any remedy, except to accept the compensation provided by law. *As we have indicated, the right of an employee's dependents to recover for wrongful injury resulting in the death of such employee is not the result of any contract. It is a constitutional right which cannot be denied dependents without their consent, except by a court or other judicial tribunal of competent jurisdiction after notice given and a hearing had. To hold otherwise would be depriving the applicant of property without due process of law.*

'A vested right of action is property in the same sense in which tangible things are property, and, is equally protected against arbitrary interference.' 2 Cooley's Constitutional Limitations (8th Ed.), p. 756, and cases cited in the footnote.

"If the dependents of Mariner Halling have a right to be heard on their claim for compensation in case his injury and resulting death was caused by the negligence of his employer then it follows that such dependents likewise have such right to be heard on their claim for injury resulting in his death, in the absence of any negligence of his employer so long as such injury and resulting death arose out of or was received in the course of the employment of the deceased. The Workmen's Compensation or Industrial act makes no distinction between a claim based upon negligence of the employer and a claim not founded on any negligence of the employer. *Prior to the enactment of Laws Utah 1921, c. 67, by both judicial construction and constitutional provision, the rights of the employee's dependents in case death resulted from wrongful injury were separate and distinct from the rights of the employee for such injury. The law has not been*

In *Earley* v. *Pacific Electric Ry. Co.*, 176 Cal. 79, 167 Pac. 513,[6] cited by the Utah Court in the *Halling* case, at page 118 of 71 Utah, the Supreme Court of California held that a release, given by an injured person to the wrongdoer subsequent to the injury but prior to death was no defense to an action for wrongful death brought under the statute of California which is identical with the Utah statute. This decision, of course, is contrary to the decision of this Court in *Mellow* v. *Goodyear*, supra, based on the Federal Employers' Liability Act.

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changed where the employer wilfully injures the employee, nor in case the relation of employer and employee does not exist. We find nothing in the language of the Workmen's Compensation or Industrial Law in its present form indicating any legislative intent to change the nature of the rights of the dependents who claim compensation under the provisions of such law rather than under the law as it existed before we had a Workmen's Compensation or Industrial Act. In the main, the reasons advanced in support of the conclusions reached in the case of *Mason v. Union Pacific Railroad Co.*, supra, are applicable here. *We are therefore of the opinion that the wife and minor children of Mariner Halling did not, and could not, derive any claim for compensation through the deceased, but their claim is separate and independent of any claim deceased may have had during his lifetime.* • • • (71 Utah, 121-123.)

"In the case of *Biederzycki v. Farrel Foundry & Machine Co., supra, the defendant had been given one opportunity to be heard, but the applicants in this case were in no sense given any opportunity to be heard in the proceedings had upon the application of Mariner Halling. The applicants in the instant case were entire strangers, in a legal sense, to the proceedings had upon the application of Mariner Halling. They may or may not have known of the former proceedings. It is clear that they had no right to control the former proceedings, nor to produce or cross-examine witnesses, nor to appeal from the judgment rendered, nor to prevent Mariner Halling from filing or refusing to file his application for compensation.*" (71 Utah, 124.)

(*Halling* v. *Ind. Comm. of Utah*, 71 Utah 112, at pp. 121-123, 124.)

[6] The following is quoted from the decision:

"Section 377 of the Code of Civil Procedure, under which this action was brought, provides that:

> 'When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In

In *Tann* v. *Western Pacific Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971 (cited by the Supreme Court of the State of Utah in the *Halling* case at page 118 of 71 Utah), it was held that the statute of limitations pertaining to bringing of personal injury actions was not controlling in an action for wrongful death, but that the running of the statute of limitations in the latter action commenced with the death and not with the injury. This decision is contrary to that of this Court in *Flynn* v. *New York, New Haven & Hartford Railroad Co.*, supra, relied upon by the Circuit Court of Appeals; where limitations of actions provisions in the Federal Employers' Liability Act were construed, declared and applied.

In *Blackwell* v. *American Film Co.*, 189 Cal. 689, 209 P.

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every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just.'

"The attorney for the appellant, and amici curiae adopting the same construction of the law as does appellant's attorney, have presented for the consideration of this court elaborate briefs discussing the origin of the right of action for wrongful death under Lord Campbell's Act, the varying statutes of the states of the United States passed after, and some in copy of the English act, and from a learned and elaborate analysis reached the conclusion that the wrong which the defendant committed—the tort upon the person of the deceased—was necessarily but a single wrong, and that, as the defendant had received its full acquittance and discharge from all consequences arising from that wrong from the injured man himself, the wrong itself was compensated for, and in point of law was extinguished, so that it could not be made the basis of any further action by any person whatsoever.

"It would not be without interest, but at the same time it is wholly unnecessary to follow these learned counsel in their analyses of the varying statutes and the decisions of the courts upon them. For when the last word shall have been said in such a consideration, the paramount fact will still remain that rights under our section 377 of the Code of Civil Procedure are to be defined not by what other courts have said touching their own statutes, but from the meaning and intent of our own law derived from a reading of it. Upon this matter we are not without light from previous decisions. Thus in *Munro* v. *Dredging Co.*, 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248, referring to this section, it is said:

'It may be observed that the language of the statute of this state (section 377 C. C. P.) is broader than the language of the English statute.'

999, (cited by the Supreme Court of Utah in the *Halling* case at page 118 of 71 Utah), the court held that the satisfaction of a judgment obtained by decedent in an action instituted to recover damages for personal injury did not prevent a recovery by his wife for her husband's wrongful death caused by the same wrong inasmuch as she was suing, not to recover damages for the injuries and consequent sufferings and loss to decedent, but to recover as an heir or personal representative the damages she had sustained by reason of decedent's death. This holding is contrary to the holding of this Court in *Mellon* v. *Goodyear*, 277 U. S. 335, 48 S. Ct. 541, construing the Federal Employers' Lia-

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"In the case of *Burk* v. *Arcata & Mad River R. R. Co.*, 125 Cal. 363, 57 Pac. 1065, 73 Am. St. Rep. 52, it is said:

> 'The statutes in the different states, though varying greatly, follow generally Lord Campbell's Act, 9 and 10 Victoria, c. 95. In that it was recited that no right of action existed at common law for such damages. It was then a new right of action. It could not be a continuance of the right which the injured man had for the injury; for the loss to his heirs did not accrue until he died. Under our statute the injured person might survive long enough to sue and recover damages, or to settle with the wrongdoer, and then, by his death, a new cause of action would accrue to his heirs. True, it has been held differently in some states, which have what are called 'survival statutes.' Here it has been ruled, as the fact evidently is, that the statute creates an entirely new cause of action.'

"Some statutes are but statutes of survivorship. They carry over to some living person after the death of the injured person precisely the right of action and precisely the right of recovery which the injured person would have had if his injuries had not resulted fatally. Manifestly under such a statute a composition agreement and release of the wrongdoer deprives the living person, who may have been empowered by the statute to commence or carry on the action, of all right of recovery. But such is not our statute. Our statute creates a new right of action with a different measure of damage from that which accrued to the injured person as a result of the defendant's wrongdoing. The right of action is to the heirs or representatives of the deceased and the elements of damage (without here attempting to specify them all) include in the case of the widow an admeasurement of the financial loss occasioned to her by the death of her husband through the deprivation of his society, comfort, and protection. Upon the other hand, the right to recover for physical suffering—a right which is always an element of damage when the action is prosecuted by the

bility Act and relied on by the Circuit Court of Appeals in this case.

The holding of the Circuit Court of Appeals is likewise contrary to and in conflict with the decisions in the following cases where wrongful death statutes have been given a construction and application similar to that given to the Utah Statutes and constitutional provisions in the *Halling* case: *Rowe* v. *Richards*, 35 S. D. 201, 151 N. W. 1001, L. R. A. 1915E, 1075, Ann. Cas. 1918A, 294; *Phillips* v. *Community Traction Co.*, 46 Ohio App. 483, 189 N. E. 444; *Routh* v. *List & Wetherly Const. Co.*, 124 Kan. 222, 257 P. 721, 62 A. L. R. 150; *In re Cripp*, 216 Mass. 586, 104 N. E. 565; *American Steel Foundries* v. *Industrial Commission*, 361 Ill. 582, 198 N. E. 687; *Stokes* v. *Collum Commerce Co.*, 120 Okla. 133, 252 P. 390. Admissions made by the deceased person during his life are inadmissible in an action for his wrongful death. *Marks* v. *Reissinger*, 35 Cal. App. 44, 169 P. 243. A judgment for injuries sustained is not a defense to an action for wrongful death: *Robinette* v. *May Coal*

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wronged and injured person—is not from its nature an element of the damage which the heir or personal representative may recover under the action given by our statute.

"One simple illustration, we think, will make the matter quite plain. A servant suffers wrongful and debilitating injuries at the hands of a third person. That third person is, of course, liable to the injured servant. The injured servant, however, compromises with a wrongdoer for the injuries which he has received and gives him a full release and acquittance. At the same time and by reason of the same single tort the master has his right of action against the wrongdoer for the loss of his employe's services. This was the right of action recognized at common law and is recognized by the statute law of this state. Civ. Code, Sec. 49. Would any one contend that the release of the wrongdoer by the servant operates also as a release and discharge of the wrongdoer from his liability under the independent right of action given by the law to the master? That right of action is wholly independent, precisely as is the right of action created in favor of the heirs, and it is no less independent because it has its origin in the same tort. The judgment and order appealed from are therefore affirmed."

(*Early* v. *Pacific Electric Ry. Co.*, 176 Cal. 79, 167 Pac. 513.)

Co., 31 Ohio App. 113, 166 N. E. 818; *Dayhuff* v. *Brown & Allen*, 150 Ga. 290, 103 S. E. 458; *Chicago, R. I. & P. Ry Co.* v. *Martin*, 59 Kan. 437, 53 P. 461; *Pittsburgh, C. C. & St. L. R. Co.* v. *Hosea*, 152 Ind. 412, 53 N. E. 419; *Tingley* v. *Long Island R. Co.*, 96 N. Y. S. 865.

It is apparent from the authorities hereinabove cited that the rights of action created by the various death statutes differ widely. The action may be a survival action only. It may be a new and independent action. It may be one dependent upon the rights of the decedent immediately prior to death or it may be an action of such nature that decedent was powerless while living to control, settle, compromise, liquidate, satisfy, discharge or abrogate by any means at his command whatsoever.

Prior to the decision of the Circuit Court of Appeals in this case, the action created by the Constitution and Statutes of Utah was of the latter type. As a result of that decision, there has been an amendment to the Utah law by judicial implication.

In *Helgeson* v. *Powell*, 54 Idaho 667, 34 Pac. 2d 957, the Idaho Supreme Court was forced to recognize the amendment of its statute by judicial implication:

> "Thus it will be seen that by the construction this court has placed on said statute, it has the same force and effect by implication as if it expressly contained the provision 'whenever the wrongful act would have entitled the person injured to maintain an action if death had not ensued.' " (See 34 Pac. 2d at page 961).

The Court's attention has been heretofore called to the fact that this so-called amendment "by judicial implication" was stricken from the Utah Law by the positive and definite act of its State Legislature. It is submitted that the decision of the Circuit Court is contrary to and in conflict with local applicable law, and therefore should be reversed.

Point III

Neither the Hepburn Act, 49 U. S. C. A., Section 1(7), nor the contractual condition, attached to the free pass issued to petitioners' father pursuant to said Act, are material here.

Relying upon the Hepburn Act and the contractual conditions attached to the free pass, the trial court instructed the jury that as a matter of law respondent was exonerated from ordinary negligence:

> "* * * they were riding on a pass, a railroad pass issued by the defendant, Southern Pacific Company. That pass recited and provided that the railroad company could not and would not be held liable for any negligence of its employees *by which these plaintiffs might be injured.*
>
> "Now, the Supreme Court of the United States has held that the waiver is valid and that when people sign such a waiver and ride on a pass containing it, they are not permitted to recover for just ordinary negligence." (R. 207)

The Circuit Court of Appeals in reliance upon the Hepburn Act and contractual conditions affirmed the trial court.[7]

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[7] In Opinion of Circuit Court of Appeals (R. 275, 276):

"At the time of the fatal accident, the father of the plaintiffs was using the pass issued to him in transportation in interstate commerce. The pass had been issued under the provisions of the Hepburn Act, as amended, 49 U. S. C. A. Sec. 1. The force and effect of a condition attached to such a pass absolving the company from liability for injuries to person or property is not governed by the law of the state in which personal injury or death occurred. It is governed by federal law. Northern Pacific Railway Co. v. Adams, supra; Kansas City Southern Railway Co. v. Van Zant, 260 U. S. 459. And where the holder of a pass containing a provision of that kind uses it for transportation in interstate commerce as a passenger on the train of the company issuing the pass and is killed while en route as the result of an accident, the company is not liable to the surviving heirs of the deceased under a state statute such as section 104-3-11, supra, for

Neither the Hepburn Act, the contractual provisions attached to the free pass, nor the cited cases are material or determinative of the issues raised in this case.

In *Kansas City Southern Railway Co.* v. *Van Zant*, 260 U. S. 459, 43 S. Ct. 176, this Court held that Congress by the enactment of the Hepburn Act assumed control over the entire field of free passes issued by railroad companies. That case recognizes the right of railroad companies in dealing with their employees pursuant to the Act to attach contractual conditions to the passes and holds that as between the parties to the pass those contracts are valid. It is earnestly contended, however, that Congress, by the enactment of the Hepburn Act, did not intend to assume control over every field of law that might be involved, indirectly, collaterally or otherwise, in the issuance or use of free passes. It cannot be presumed from the enactment that Congress thereby intended to assume control over wrongful death actions generally nor to limit the unquestioned power of states to determine the nature, extent and characteristics of wrongful death actions arising within their borders. No such limitation or control of wrongful death actions is necessary, useful or required in order to give full force and effect to the Hepburn Act or any part or portion thereof, or to afford Congress full power to control the issuance and use of free passes. Certainly the purpose of Congress to prohibit the free transportation of passengers with certain exceptions by interstate carriers as declared in the Hepburn Act should not be extended by unnecessary implication to the point of regulating, controlling, limiting and abrogating rights arising under state

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damages approximately caused by ordinary negligence in the operation of the train. Northern Pacific Railway *v.* Adams, supra. Therefore the court was correct in declining to submit to the jury the issue of ordinary negligence in the operation of the second section of the train, as charged in the first count of the complaint."

wrongful death statutes or to the point of extinguishing rights of strangers to the permitted free pass and contractual conditions attached thereto. We submit that the recognition and enforcement of the rights claimed by petitioners here cannot be deemed an infringement on the admitted power of Congress to control and regulate interstate commerce, nor to control the issuance and use of passes. Without question, the validity of free passes and contracts limiting liability of carriers entered into in consideration of the issuance of such passes are questions of Federal law under the *Van Zant* case. Petitioners have never questioned the validity of the free pass or the contract entered into between respondent and Jack Francis in consideration of its issuance but have insisted that the pass and contract are immaterial here. In the *Adams* case this Court held that a contract limiting the liability of the railroad company to the holder of the pass was valid, not as a matter of Idaho or Federal law, but as a matter of general law. In the *Van Zant* case the court concluded from the holding in the *Adams* case that under Federal law contracts limiting liability entered into between the carrier and the passenger in consideration of the issuance of the pass are not void as against public policy. It seems obvious, however, that the admitted validity of the pass contract cannot affect or determine the rights of petitioners in their action to recover damages suffered by them as result of their parents' wrongful deaths. The past contract was between decedent and respondent. Petitioners were not parties to it and should not be required to suffer the loss of their birthright because of it. The contract does not purport to cover or limit the rights of petitioners, the children of the decedents, if it did it would be void as to them.

If, in law, petitioners' right of action was dependent upon the existence of an enforcible right in decedent at the time of his death, then the pass contract would defeat them, not

because of their being bound by the contract, but for the reason that their rights being dependent upon the enforcibility of their parents' right prior to death, would be likewise unenforcible. It is clear, however, as heretofore indicated that under Utah law petitioners' rights are wholly independent of the rights of their father at and prior to death. Inasmuch as their cause of action is not dependent upon the enforcibility of a right of action in decedent prior to death, the contract is immaterial here, as is the Hepburn Act under which it finds sanction.

In the paragraph of the opinion which contains the Circuit Court's discussion of the Hepburn Act (R. 275, 276), appears the statement that where the holder of a pass, containing a provision limiting liability, uses it for transportation on a train in interstate commerce and is killed while en route, the company is not liable to the surviving heirs of the deceased under a State statute, such as the Utah Statute. The *Adams* case is cited as authority. In the first place, the Circuit Court of Appeals was not called upon to construe and apply a statute similar to the Idaho Statute discussed in the *Adams* case. In that case the Idaho Statute was given an interpretation, construction and application contrary to that given the Utah Statute by the State's highest court. The Idaho Statute, as matter of law and fact, is therefore contrary to the Utah Statute, and this alone should have required a reversal.

The only reason why this Court held the pass waiver to be a defense to the action of the heirs of the decedent in the *Adams* case was the companion holding that by reason of the pass waiver the decedent had no enforcible cause of action against the railroad company at the time of his death and under Idaho Law the existence of an enforcible right of action in decedent immediately prior to death was a necessary condition to the enforcement of the heirs' right of action. This Court did not hold that the heirs were

parties to the contract or were bound by its provisions. We submit that none of the authorities cited by the Circuit Court of Appeals are applicable to the case at bar.

It seems apparent that the only possible effect which the Hepburn Act could have in a determination of rights arising or claimed under State Wrongful Death laws would be indirect and collateral in nature and effective only through the medium of contracts annexed to and made a part of free passes issued pursuant to said Act. The Hepburn Act does not purport to regulate contracts entered into by railroad companies and their employees in connection with the issuing of passes, its stated purpose is to limit and control the issuance of free passes by interstate carriers.

The principle to be used in testing the effect of any activity upon interstate commerce and determining whether or not it is direct or indirect has been repeated by this Court many times, but in no decision is it more clearly nor more succinctly stated than in *A. L. A. Schechter Poultry Corporation et al.* v. *United States*, 295 U. S. 495, at page 544, 548, 55 S. Ct. 837, 849, 79 L. Ed. 1570, 97 A. L. R. 947.[8]

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[8] "In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as e. g., the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people,

Point IV

Neither the Hepburn Act nor the contractual conditions attached to the free pass relieve respondent of its duty to exercise ordinary care in the transportation of petitioners' parents.

The provisions of the contract of carriage created by this free pass are contrary to public policy if construed in such manner as to relieve respondent from the duty to exercise ordinary care in the transportation of the user of said pass. It is rather difficult to determine from the decision of the Circuit Court whether or not it was decided that in view of the pass contract respondent railroad company owed no duty to Mr. and Mrs. Francis except to refrain from injuring them fatally or otherwise by any wanton, wilful or intentional misconduct. It is submitted that a holding to the effect that by the contract the railroad

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and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control. As we said in the Minnesota Rate Cases, 230 U. S. 352, 410, 33 S. Ct. 729, 745, 57 L. Ed. 1511, 48 L.R.A. (N.S.) 1151, Ann. Cas. 1916A, 18: 'In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored, and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the state, enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the state.' See, also, Kidd v. Pearson, 128 U. S. 1, 21, 9 S. Ct. 6, 32 L. Ed. 346; Heisler v. Thomas Colliery Co., 260 U. S. 245, 259, 260, 43 S. Ct. 83, 67 L. Ed. 237.

"The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. Coronado Coal Company v. United Mine Workers, 268 U. S. 295, 310, 45 S. Ct. 551, 69 L. Ed. 963. But, where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an

company became possessed of an irrevocable license to injure or kill the decedents by any act or conduct short of wilful, wanton and intentional misconduct would constitute the approval of a doctrine as wicked and uncivilized as ever existed in the laws of any country.

The Utah laws provide a cause of action to the heirs of any person suffering death as a result of the wrongful act or neglect of another. Whether any particular conduct, act or omission constitutes "wrongful act or neglect" within the meaning of the statute depends upon the principles of general law and is not a matter to be resolved by the terms of a particular contract. Even granting for the purpose of argument that the quality of respondent's conduct as being negligent, wrongful or otherwise might properly be determined as between respondent and Mr. and Mrs. Francis on the basis of the contract, any such determination should not be binding upon petitioners and thus destructive of their rights inasmuch as they were not parties to the agreement in any manner or sense whatsoever. It would lead to legal complications, confusion and the complete

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indirect effect upon interstate commerce does not subject the parties to the federal statute, not withstanding its broad provisions. This principle has frequently been applied in litigation growing out of labor disputes. United Mine Workers v. Coronado Coal Company, 259 U. S. 344, 410, 411, 42 S. Ct. 570, 66 L. Ed. 975, 27 A. L. R. 762; United Leather Workers' International Union v. Herkert, 265 U. S. 457, 464-467, 44 S. Ct. 623, 68 L. Ed. 1104, 33 A. L. R. 566; Industrial Association v. United States, 268 U. S. 64, 82, 45 S. Ct. 403, 69 L. Ed. 849; Levering & Garrigues v. Morrin, 289 U. S. 103, 107, 108, 53 S. Ct. 549, 551, 77 L. Ed. 1062. • • •

"While these decisions related to the application of the federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government."

A.L.A. Schechter Poultry Corporation et al. v. *United States*, 295 U. S. 495, at page 544, 548, 55 S. Ct. 837, 849, 79 L. Ed. 1570, 97 A. L. R. 947.

defeat of justice to hold that the nature, quality and legal characteristics of respondent's conduct be identified, determined and appraised by the raw terms of the contract regardless of well-recognized legal standards of conduct. It is submitted that from a purely rational point of view the railroad company owed the same duty of care to every person on the train whether traveling as a paying passenger, a free pass passenger, or with the mere consent and knowledge of the company. It might be that as between the railroad company and a free pass passenger the company, by reason of the contract, would have an adequate defense to any action for damages growing out of the negligent operation of the train. This defense would not be grounded upon the theory of nonexistence of duty, but on the ground that the company by the contract had insulated itself against liability for failure to discharge its duty of reasonable care. The railroad company owed Mr. and Mrs. Francis the duty of exercising ordinary care for their safety by reason of the fact that it accepted the responsibility of carrying them as passengers and by reason of the further fact that Mr. and Mrs. Francis were human beings. To hold otherwise would rob the law of any element or quality of ordinary justice based on the great humanitarian principle underlying all of the law of negligence.

In the case of *Southern Pac. Co.* v. *Schuyler*, 33 S. Ct. 277, 227 U. S. 601, 57 L. Ed. 662, 43 L. R. A. (N. S.) 901, affirming 37 Utah 581, 109, p. 458, an employee in the railway mail service, in good faith and with the consent of the carrier, accepted free passage in interstate transportation from San Francisco to Ogden. This was subsequent to the passage of the Hepburn Act. While en route he lost his life as the result of a train wreck. The Supreme Courts of the United States and Utah each held that this passenger did not forfeit his right to the benefit of the rule of local

law which charges a carrier with the duty to exercise care for the safety of gratuitous passengers.[9]

Is the duty of care to one who rides the train without ticket or free pass greater than to one who rides the train in full compliance with the requirements of the law and company rules?

Point V

Petitioners have been deprived of property without due process of law in violation of the Constitution of the United States.

Immediately upon the deaths of their parents, petitioners became vested with a cause of action for wrongful death. This vested right was property in the constitutional sense of the term. The nature, extent and characteristics of this cause of action were all determined by Utah Law. Amongst the advantages and benefits of this right to re-

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[9] * * * In this connection the court said: 'It is argued (b) that it was beyond the power of the state court to 'read into the Hepburn Act (this paragraph) an exception in favor of gratuitous passengers;' thereby (as is said) enlarging the class to whom Congress limited the right of free interstate transportation. This is ingenious, but, as we think, unsound. As applied to the concrete case, it is equivalent to saying that the operation of the Hepburn act is such as to deprive one who, in good faith and without fraud; and with the consent of the carrier, but in actual though unintentional violation of the prohibition of the act, accepts a free passage in interstate transportation, of the benefit of a rule of local law that renders the carrier in such circumstances responsible for exercising care for the passenger's safety because the carrier has voluntarily undertaken the burden of such care. But the act itself declares what penalty shall be imposed for a violation of its prohibition: 'Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty.' This penalty is not to be enlarged by construction. Neither the letter nor the spirit of the act makes an outlaw of him who violates its prohibition by either giving or accepting gratuitous

cover was the fact that by constitutional and statutory enactment and judicial determination it was free from the danger of abrogation from any source whatsoever. Neither the Legislature of the State of Utah, the courts, respondent, or the parents of the petitioners could limit or abrogate this right of recovery by any act, official, personal or otherwise. The Circuit Court of Appeals, contrary to the laws of Utah, abrogated this cause of action by making petitioners' right of recovery dependent upon the existence of an enforcible right in their parents prior to death. This in effect divested petitioners of property contrary to the Fifth Amendment to the Constitution.

The characteristics of the right of action for wrongful death under Utah law have heretofore been explored and discussed at length. Inasmuch as the judgment of the Circuit Court of Appeals is rested upon the contractual provisions attached to the free pass, this contract is significant. The contract purported to relieve respondent from its usual and customary duty in the transportation of passengers, and therefore should be strictly construed.

It was a contract between respondent and the user of the pass, and does not by implication or otherwise purport to deal with the rights or property of others. The contract

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interstate carriage. The deceased no more forfeited his life, limb, or safety, and no more forfeited his right to the protection accorded by the local law to a passenger in his situation, than the carrier forfeited its right of property in the mail car upon which the deceased rode. His right to safe carriage was not derived, according to the law of Utah, from the contract made between him and the carrier and therefore was not deducted from the supposed violation of the Hepburn act. It arose from the fact that he was a human being of whose safety the plaintiff in error had undertaken the charge. With its consent he had placed his life in its keeping, and the local law thereupon imposed a duty upon the carrier irrespective of the contract of carriage. The Hepburn act does not deprive one who accepts gratuitous carriage under such circumstances, of the benefit and protection of the law of the State in this regard."

Southern Pac. Co. v. *Schuyler*, 227 U. S. 601, 57 L. Ed. 662, 43 L.R.A. (N.S.) 901, affirming 37 Utah 581, 109 P. 458.

absolves respondent from liability for injury but does not purport to absolve for death nor does it purport to deal with any cause of action which might come into existence upon the death of the pass user. The fact that the contract does not purport to relieve respondent from liability in the event of death is entirely logical. If the pass user were killed while riding on the pass, he would not have any right of action against respondent. In Utah it has been regarded as settled law since *Mason* v. *Union Pacific R. Co., supra,* that whatever right of action a decedent might have had for injuries sustained by him dies with him and the Wrongful Death Statutes transfer no corresponding right to his personal representative. No doubt the parties to the contract realized and understood this matter of law and made no attempt to deal with rights not possessed by either of them. The contract does not purport to be binding in any way upon the personal representatives or heirs of decedent.

The Circuit Court of Appeals, as did the trial court, enlarged the scope and effect of this agreement and made it determinative of the rights of strangers to the contract in matters not covered by its terms. There is no apparent justification for this unwarranted enlargement. Regardless of the fact that the free pass contract did not purport to absolve respondent from liability for the death of the pass user, the trial court and the Circuit Courts of Appeals nevertheless extended and enlarged the scope of the agreement to the extent of providing absolution to respondent from this liability.

The Supreme Court of Utah, in *Halling* v. *Industrial Commission of Utah, supra,* held that the abrogation of a right of action for wrongful death without the legal consent of the heirs constituted the taking of property without due process of law. "To hold otherwise would be depriving the applicant of property without due process of law" (71 Utah 112, at 122).

It is therefore clear that respondent and the parents of petitioners, acting individually or concertedly, were legally incompetent to abrogate petitioners' cause of action and thereby deprive them of their property without their consent or without legal sanction, but, nevertheless, the courts below have given sanction to a deprivation of this property by the unwarranted enlargement and construction given the pass contract.

There is nothing in the Hepburn Act, its title or any part or portion thereof which can be tortured into a manifestation of congressional intent to abrogate, limit or destroy rights of action for wrongful death created by the laws of the various States. It necessarily follows that the mere exercise of a contractual privilege sanctioned by the Act should not be permitted to enlarge or extend its scope, effect, or intendment. If no such abrogation, limitation or destruction of property, property rights or causes of action was accomplished or intended by the Hepburn Act itself, it must necessarily follow that for greater reason a contract made under sanction of the Act would be insufficient to limit, abrogate or destroy such right of action.

We believe that no authority contrary to this proposition can be found. The *Adams* case does not support a contrary position. As pointed out, this Court gave controlling effect in the *Adams* case to the Idaho Wrongful Death Statute. What is sought here is a decision of this Court giving controlling effect to the statutes of the State of Utah.

In the *Van Zant* case, *supra*, it was held, in a personal injury action, that a limitation of liability on the free pass was effective. The *Van Zant* case, however, was not a death case and the limitation of liability was enforced against one of the parties to the contract. In this case the agreement was held binding upon petitioners who were incompetent to become parties to it. The authority for the Hepburn Act is found in Article 1, Section 8, Clause 3, of the Federal

Constitution, giving Congress power to regulate commerce. The exercise of this power by Congress is, however, subject to the Fifth Amendment.

In *Currin* v. *Wallace*, 306 U. S. 1, 59 Sup. Ct. 379, 83 L. Ed. 441 (1938), this Court stated (306 U. S. 14):

> "Undoubtedly, the exercise of the commerce power is subject to the Fifth Amendment (*Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336, 37 L. Ed. 463, 471, 13 S. Ct. 622, 630; *United States v. Cress*, 243 U. S. 316, 326, 61 L. Ed. 746, 752, 37 S. Ct. 380, 384; *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 589, 79 L. Ed. 1593, 1604, 55 S. Ct. 854, 863, 97 A. L. R. 1106, 28 Am. Bankr. Rep. (N. S.) 397); * * *"

In exercising constitutional authority to regulate commerce, Congress is powerless to regulate anything which is not commerce as it is powerless to do anything about commerce which is not regulation. *Carter* v. *Carter Coal Co.*, 56 Sup. Ct. 855, 298 U. S. 238, 80 L. Ed. 1160. The power to regulate commerce like the other great substantive powers of Congress is subject to the Fifth Amendment. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336, 37 L. Ed. 463, 471, 13 Sup. Ct. 622; *United States* v. *Joint Traffic Assoc.*, 171 U. S. 505, 571, 43 L. Ed. 259, 288, 19 Sup. Ct. 25; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 410; 50 L. Ed. 246, 250, 26 Sup. Ct. 66; *United States* v. *Lynah*, 188 U. S. 445, 471, 47 L. Ed. 539, 549, 23 Sup. Ct. 349; *United States* v. *Cress*, 243 U. S. 316, 326, 61 L. Ed. 746, 752, 37 Sup. Ct. 380; *Adair* v. *United States* (Ky. 1908), 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436; *Standard Oil Co. of Indiana* v. *United States* (Ind., 1908), 64 Fed. 376, *Cert. den.* 29 Sup. Ct. 689, 212 U. S. 579, 53 L. Ed. 659.

It is submitted that even though a congressional intent to limit or abrogate the rights created by Utah Wrongful Death Statutes could be found within the terms and provisions of the Hepburn Act, such act would be to that extent

unconstitutional as clearly appears from the authorities hereinabove cited, but no such intention can be found.

There is nothing in the full enjoyment of the rights claimed by petitioners here which can be regarded as obstructive in any manner whatsoever to the admitted power of Congress to regulate all phases of interstate commerce.

The Circuit Court of Appeals, by its decision, has wrongfully deprived petitioners, who were not parties to the contract of carriage nor to the contractual conditions attached to the free pass, of a most valuable property right. The error thus committed is exaggerated by the fact that under Utah law the parents of petitioners were powerless to lessen, change, modify, abrogate or deal with the property rights or interests which belonged to petitioners. By constitutional provision they were rendered powerless to deal with the property rights in the cause here, a cause brought into existence by their deaths and which had no existence prior thereto. The situation here is not analogous to cases where decedent was contributorily negligent as that defense is imposed by law. The defense here is founded upon contract. Many cases make this distinction and the authorities are collected in 25 C. J. S. 1144, Death, Section 47.[10]

The contract upon which respondent's defense herein is based was entered into long before decedents were killed. The authorities sustain the proposition that ordinarily a

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[10] "• • • However, except in the case of a right based on survival statutes, the logic of the decisions has been questioned, and it has been held that, where the statute creates an entirely new cause of action, distinct and independent of any right of action deceased may have had during his lifetime, a release executed by deceased before his death cannot deprive the beneficiary of the right which the statute gives him • • •." 25 C. J. S. 1144, Death, Section 47.

decedent cannot contract away the statutory rights of beneficiaries by a contract made before injury.[11]

The holding of the Circuit Court of Appeals in this case is contrary to the principle to be followed in the construction of such contracts as announced in the case of *Clark, et al.* v. *Geer*, 86 Fed. 447 (1898).[12]

It is submitted that petitioners have been deprived of property without due process of law. Their property has been taken from them without their consent, and without an opportunity to be heard. They have been deprived of the rights guaranteed them under the *Fifth Amendment* to the

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[11] "Where a contract exemption from liability is deemed valid, and would have afforded a defense to an action by decedent for the injury to him, it is also, in some jurisdictions, a defense to an action for the resulting death. However, the contrary has been held under statutes not making the right of action dependent on the existence of a right of action in decedent, and, in some cases, it has been held, that whether or not decedent could bar the statutory right of action by settlement and discharge made after the injury and before his death, he cannot contract away statutory rights of the beneficiaries by contract made before the injury." 25 C.J.S. 1145, Death.

[12] "• • • The contract involved in the case at bar, as we view it, was one in which the deceased placed a limit upon the amount of damage that would be claimed by himself in case he sustained an injury and sought to recover compensation. Even if it was competent for the deceased to have done so, the contract in question will not bear the construction that he attempted to place a limit upon the amount which might be recovered by his personal representative, suing for the sole benefit of his widow, children, or next of kin, in case he received a fatal injury for which his personal representative could alone sue. The right of action which was sued upon in this case was created by a statute of the state of Kansas (2 Gen. St. Kan. 9187, p. 213) which allows the plaintiffs to recover, for the injuries complained of, any sum not exceeding $10,000. It is a right of action which did not exist at common law, and, without the clearest evidence of such a purpose, we will not presume that the deceased intended to make a contract that would alter the rights of his widow and children or next of kin, as defined by the statute. It is sufficient to say that the agreement upon which the defendant companies rely to limit the damages that may be recovered shows, as we think, that the deceased was contracting solely with reference to a liability of the carrier to himself, and not with reference to the statutory liability of the carrier to others, in case of his death through the wrongful act, neglect, or default of the carrier." *Clark, et al.* v. *Geer*, 86 Fed. 448 (1898).

Constitution of the United States and are left without any remedy whatsoever save this petition.

Point VI

Petitioners were deprived of the right of trial by a jury selected from a cross-section of the community, contrary to the decision of this Court in Thiel v. *Southern Pacific Company, 328 U. S. 217, 66 S. Ct. 984.*

In support of their Motion for New Trial petitioners presented proof by affidavits that the jury panel from which the jury in this case was selected had been drawn contrary to the holdings of this Court in *Thiel* v. *Southern Pacific Company, supra.* In the affidavit filed by one of counsel for petitioners (R. 23, 25) it was declared that lists had been made of the names of all persons called for jury service during the years 1944, 1945 and 1946; that these lists had been delivered to the officers of practically every labor union in the State of Utah and were checked with union membership rolls to determine whether or not union members had been called for jury service during these years, that the officers of 66 union locals had filed affidavits stating that they had checked the lists of jurors against the membership rolls for the years 1944, 1945 and 1946, and that said check revealed the following facts:

Year	*Membership*	*Called for jury service*
1944	32,129	3
1945	31,156	4
1946	31,389	4

Affiant also declared that according to the census reports for Utah 1940 the State had a population of 550,310; that 389,086 were over the age of fourteen years, that 91,784 were employed in private industry, that 12,962 were seeking employment, making a total laboring population of 104,746,

Summaries of the affidavits of Union officers are set forth in the record (R. 26 to 37 inclusive).

At the hearing on the motion for new trial the clerk of the court and the jury commissioner, the officers who select the jurors, were sworn and testified (R. 227). The clerk selects half the names from residents of Cache, Weber and Salt Lake Counties and the jury commissioner selects the other half from residents of the balance of the State (R. 227). The Clerk testified that about half of the names selected by him were secured from Polk directories for Salt Lake City and Ogden (R. 235) and that the other half were chosen by him from amongst persons he knew or met and believed would make good jurors (R. 228), that he also used the names of housewives given by friends upon his solicitation. In determining which names should be selected from the city directory he testified (R. 238):

> "I look at the city directory and I see a man that works for some institution; I think that he must be a man of good moral standing and he must be a pretty good man or perhaps that institution wouldn't have him."

If from the information therein contained he came to the conclusion that the person would make a good juror he put the name in the box. In selecting the names from among persons he knew, he determined whether or not they were good citizens (R. 234):

> "I knew they would be good jurors because good, substantial thinking people."

It appeared that during the three years, 1944, 1945 and 1946, when 11 members of organized labor were called as jurors, 29 bankers, 18 insurance men and 52 merchants were summoned (R. 237). The clerk readily admitted that there were perhaps 100 times more members of organized labor in the State of Utah than bankers, insurance men or

merchants (R. 237), and he could not account for the discrepancy (R. 236, 241). Under Section 48-0-10, Utah Code Annotated, 1943, 14 classes of persons may claim exemption from jury service (R. 229). If one of the names considered appeared to come within any one of the said classifications, the name was not placed in the jury box. It is to be observed that the exemptions provided for in that section are not disqualifications, and persons need not claim such exemption and are eligible for jury service unless they assert their exemption. While it appeared that the clerk had never attempted to obtain names of persons from organized labor (R. 244) nevertheless he did pick business executives from time to time in order to bring about a cross-section of jurors (R. 232).

The jury commissioner selected the names from the less populous areas of the State and testified that during the last two years (1945 and 1946) he had picked the names from lists given him by friends and from convention notices in various papers (R. 252, 253). The commissioner had formerly been the purchasing agent for the Consolidated Wagon & Machine Company (R. 249) and had obtained names of persons who were thought to be good jurymen from the traveling men and branch managers of this concern. In selecting names from newspaper reports of State conventions in Salt Lake, such as cattlemen's conventions and horsemen's conventions, he "took their names for granted that they wouldn't be a member of an association or be a delegate to a convention unless they were up and up" (R. 250). In explaining what he meant by "up and up" the commissioner stated (R. 256):

> "Well, they want to be good citizens, American citizens, and high in the community in which they live and in these country towns where mostly farmers I would imagine a farmer that was a progressive would

make a better juror for the court than one who is shiftless and a tenant or something of that kind."

When the commissioner was asked for an explanation why no members of organized labor in Carbon County were included in the jury list, he stated that he had nothing to say (R. 254, 255). In 1944 there were 3900 members of organized labor in Carbon County; in 1945 4000 members, in 1946 4300 members (R. 34). The commissioner later testified that about two years before he had a branch manager at Price (Carbon County) on whom he relied for names but that since that time he hadn't had any names from that area to speak of (R. 256).

It is submitted that the foregoing testimony establishes that the panel from which the jurors in this case were drawn was hand-picked and did not represent a fair cross-section of the inhabitants of this State. The practice of selecting those whom the jury commissioners think are good substantial thinking people, or who are employed by companies that would only employ good men, or who are "up and up", defeats the constitutional guaranty of trial by a jury drawn from a cross-section of the community.

It seems apparent that the rule announced in the *Thiel* case, supra, was violated by the Federal District Court of Utah in the selecting of juries. Without question the union membership as reflected in the affidavits exceed by many, many times the number of bankers residing in Utah, yet, over the period of three years 29 bankers were called and 11 members of organized labor. It may be that the clerk and commissioner did not intend to reject the working men for jury service but their method of selecting has most effectively excluded them. This Court in the *Thiel* case stated:

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings necessarily contemplates an impartial jury drawn from a cross-section of the community. • • •

> "This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." (66 S. Ct. 984, at page 985).

In the *Thiel* case a city directory was used as a source for obtaining names of prospective jurors and the name of a person discovered to be a longshoreman or daily wage earner was set aside because the clerk believed that he should be excused since the per diem paid for jury service was much less than his daily wage. This Court conceded that the Federal judge would be justified in excusing a daily wage earner because of undue financial hardship but that fact alone should not prevent such person being given an opportunity to serve. Similarly in the case at bar the clerk and commissioner discriminated against the 14 classes of persons who might claim exemption. These persons likewise should be given an opportunity to serve and by the process of selecting used they were completely excluded.

The Circuit Court of Appeals disposed of this contention by holding that the objection was not timely made and that the motion for new trial was not filed within the time specified by *Subdivisions* (b) and (c) of *Rule of Civil Procedure* 59, 28 *U.S.C.A.*, following Section 723.

The whole matter pertaining to the questioned practice in the selection of the jury panel was presented to the trial

court by affidavits and testimony. The trial court decided the question on the merits and denied the motion for new trial. The propriety of the trial court's action was never questioned on appeal. Petitioners appealed from the judgment and from the order of the court denying the motion for new trial. Respondent made no cross-appeal or cross-assignment of errors. Therefore the trial court having considered the matter on its merits the merits should have been considered by the Circuit Court of Appeals.

The fact that the trial court considered the question thus presented upon its merits is analogous to the situation where a trial court considers and entertains a petition for a rehearing on its merits. See *Bowman* v. *Lopereno*, 311 U. S. 262, 61 S. Ct. 201; *Pfister* v. *Northern Ill. Finance Corp.*, 317 U. S. 144, 63 S. Ct. 133. These cases hold that if the court considers the merits of a petition for rehearing not timely filed, effect will be given to such petition in extending the time for appeal. In view of the fact that the trial court entertained and considered the amended motion for a new trial and in particular the assigned ground relating to the manner of jury selection, and in effect denied the motion to strike these portions of the motion and no appeal having been taken from such ruling, the Circuit Court of Appeals erred in refusing to consider the matter on its merits.

The motion for a new trial was filed within time, but was amended after the expiration of the time allowed for filing such motion. The amendment was made before the motion was heard. The trial court at the hearing considered the grounds contained in the motion as originally filed and as amended. There is no limitation of the privilege of amending a motion for new trial in the rules but certainly when

the amendment is made before hearing and no prejudice is shown, such amendment should be considered by the trial court. In any event the matters added by amendment could be considered as particularizing the general ground contained in paragraphs 4 and 16 of the original motion (R. 18, 19) to the effect that there was irregularity in the proceedings of the court and jury and that the court ought to grant a new trial in the exercise of its inherent power to prevent injustice and to secure to all litigants a fair and impartial trial. Such amendment was allowed in *Alcaro* v. *Jean Jordeau, Inc.*, 3 F. R. D. 61.

The Circuit Court of Appeals did not determine whether the method of selecting the jury in this case was proper and in accord with the law as declared by this Court in *Thiel* v. *Southern Pacific Co.* supra, yet it did hold expressly that there was no abuse of discretion in denying the motion for new trial on the stated ground. This Court in the *Thiel* case declared that the American tradition of trial by jury contemplates an impartial jury drawn from a cross-section of the community. It held that prospective jurors should be selected by court officials without systematic and intentional exclusion of any particular group or groups and that recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. It is inconceivable that a rank and flagrant violation of this rule so clearly laid down by this Court can be revealed as it has been here and yet supported by a holding that there was no abuse of discretion in refusing to grant a new trial on such showing. It should be determined whether or not the jury was improperly selected. If the jury was improperly selected, there can be no question that the trial court abused its discretion by denying the motion for a new trial.

Any other holding would effectively destroy the rule announced by this Court in the *Thiel* case. It would be within the discretion of the trial court to say whether or not a new trial should be granted even though a violation of the rule announced in the *Thiel* case was revealed. The position of the trial court could always be upheld on the theory that there could be no abuse of discretion in denying a party his constitutional right to a jury trial. Respondent did not at any time attempt to uphold the method of selecting the jury panel adopted and followed in the District Court for the District of Utah. Its failure to do so is understandable for the very simple reason that the selection was contrary to the rule announced in the *Thiel* case and respondent's only avenue of escape is that the matter was not raised in time.

Conclusion

It is respectfully submitted that the United States Circuit Court of Appeals, Tenth Circuit, by its decision herein has decided an important question of law arising under the Constitution, statutes and controlling decisions of Utah in a manner in conflict with applicable and controlling State law, and that the Circuit Court of Appeals by its decision has deprived petitioners of property without due process of law in violation of the Constitution of the United States and by its decision has decided an important question of law pertaining to the petitioners' rights to trial by a jury drawn from a cross-section of the community in a manner contrary to the decision of this Court in the case of *Thiel* v. *Southern Pacific Co.*, supra, and that a Writ of Certiorari should be granted in order for this Court to review the record and the opinion of the United States Circuit Court of Appeals, Tenth Circuit, and finally reverse the same and

remand the matter to the court in which the action originated for further proceedings not inconsistent with the law.

Respectfully submitted,

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(2803)

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

NO. 400

JACKIE PACKER FRANCIS, a Minor, DENNIS RAY FRANCIS, a Minor, and JAMES BRENT FRANCIS, a Minor, by and Through Their General Guardians, RAY E. FRANCIS and VIRGIL O. PACKER,

Petitioners,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

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Of Counsel

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

NO. 400

JACKIE PACKER FRANCIS, a Minor, DENNIS RAY FRANCIS, a Minor, and JAMES BRENT FRANCIS, a Minor, by and Through Their General Guardians, RAY E. FRANCIS and VIRGIL O. PACKER,

Petitioners,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

SUMMARY

The issues of fact in this case were settled against petitioners by the jury. The decision below is in harmony with all applicable decisions of this court and there is no conflict among the circuits. None of the reasons ordinarily assigned by this court for the granting of writs of certiorari is apparent here.

The collision resulting in the death of petitioners' decedent occurred only because respondent's engineer was the victim of a sudden, unexpected and fatal heart attack. The collision was not the result of misconduct on the part of the engineer or any other employee of respondent.

Petitioners' decedent was riding in interstate commerce on a free pass which contains these conditions:

"CONDITIONS

"This free pass is not transferable, will be taken up and forfeited if presented or used by a person not designated on its face, and is subject to revocation at any time without notice. In its use the user assumes all risk of injury to person or property and of loss of property whether by negligence or otherwise, and absolves the issuing company and its officers and employes from any liability therefore. Use hereof in violation of any law is prohibited." (R. 9)

A jury tried the issues of fact and resolved them against petitioners. Petitioners participated in the selection of the jury with no criticism of the panel and formally accepted the jury. They went to trial with no objection to the jury or any member thereof. They first complained of the jury thirty-one days after judgment. Both the Rules of Civil Procedure and a decent respect for fair play say that such complaint came too late.

STATEMENT OF THE CASE

Jack Francis,[1] whose death is the subject of inquiry here, was riding in the rear car of the first section of respondent's ~~westbound train No. 21~~. He was riding in interstate commerce from Ogden in Utah, to Carlin in Nevada. (R. 2, 74) At the time of his injury and death, he was on vacation and not engaged in any employment. When employed, he was in train service with respondent. At the time of his death he was traveling upon the free pass referred to in the summary above.

Francis was killed when the second section of train No. 21 ran into the rear end of the train upon which he was riding. No claim is made by petitioners that there was any misconduct in the handling of the train upon which Francis was riding. The engine of the second section was

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[1] Francis and his wife were both killed at the same time and a separate action was brought for the death of Mrs. Francis. (R. 41)

manned by Engineer McDonald and Fireman Hardman. Petitioners themselves made undisputed proof that Fireman Hardman was free of negligence or other misconduct. The trial court and the jury were concerned only with the conduct of Engineer McDonald.

Engineer McDonald was dead of a heart attack when the collision between his engine and the rear end of the preceding train occurred. He was a veteran of thirty years' experience as a locomotive engineer and long familiar with the rules of safety and with the place where the accident occurred. The record contains nothing which would justify a finding that McDonald either heedlessly or willfully ignored the rules of safety.

McDonald showed up at the enginehouse in Ogden on the morning involved some little time before starting upon his fatal trip. He exchanged greetings with acquaintances and engaged briefly in conversation with Hardman, who was to be his fireman for the first time. (R. 83) To persons who saw him on that morning, he appeared to be in good health and spirits. His conversation with Hardman involved steam, water and oil. He impressed upon Hardman the necessity of seeing to it that everything was in perfect running order before departure. (R. 83, 91, 92) Within a few minutes thereafter he was dead and came into collision with the rear end of the train ahead of him.

McDonald's train had been preceded out of Ogden by one of respondent's freight trains and by the first section of No. 21. West of block signal 7639 the freight train became disabled and stopped. No claim has ever been made of any negligence or misconduct in the handling of the freight train. The first section, after stopping between signals 7649 and 7639, moved slowly forward and the collision occurred some 2458 feet west of 7639.

Fireman Hardman testified that after making the curve west of Ogden and near Little Mountain, Engineer McDonald somewhat reduced his speed in accordance with the regular custom of the engineers at that place. He very soon thereafter resumed normal speed. (R. 90) Hardman testi-

fied that at two different block signals McDonald had stated in response to a question with respect to the signals, "I got her." (R. 86) It was clear and undisputed that neither one of the signals just referred to was the last one before the collision. The block signal immediately before the collision was 7639; the one next to that was 7649; and the one still further east was 7659. (R. 63) The block signals were approximately one mile apart. Hardman was making his first trip on this run and showed a lack of acquaintance with the signal numbers and their locations. But under leading questions he finally testified, "If I get my signal numbers straight," (R. 86), it was at signals 7659 and 7649 that he said, "I got her."

A jury would be justified in finding that as late as the time Engineer McDonald approached 7649 he was still in possession of his faculties, or at least able to speak. The morning was foggy and neither Engineer Ware, who drove the first section, nor Fireman Hardman on the second section was able to make out the position of the signals until they were very near.

Upon approaching signal 7639 Hardman observed that it was red. He called loudly to McDonald and received no response, either by voice or movement of any kind. (R. 86, 87). Two thousand feet, or such a matter, further on, Hardman saw the red taillights of the first section. (R. 88) Again he shouted warning to McDonald and again he received no response whatsoever. (R. 88)

One of the first effects of the collision which followed was to instantly release steam under high pressure and in great volume into the cab where McDonald and Hardman had occupied their positions as fireman and engineer, respectively. (R. 94, 200, 202, 203). Hardman promptly left the cab and thereby avoided burning or scalding by steam. McDonald, on the other hand, did not move and plainly made no effort whatsoever to escape the scalding effects of steam which poured into the cab and upon him. (Exhibits 17, 18) The collision produced no injury to McDonald which might have proved fatal, and if he had not been dead

at the time of the collision he certainly would have made every effort to avoid the scalding steam. As he sat there after the wreck, he and his engine furnished the most eloquent and dramatic evidence that he had not consciously run his engine into another train, but that death had closed out his power to function and that it was death and not willful misconduct, or any misconduct on the part of McDonald, which caused the collision. McDonald sat at his accustomed seat before the throttle. His chin rested upon his chest, his right arm lay upon the window sill by his side, his left hand and forearm hung limply over the throttle quadrant. Before him in easy reach of either hand were the devices by which the engineer controlled his engine and train: air brakes (both automatic and emergency), steam throttle, reverse lever and sander. (Exhibit 18, R. 116, 200, 201, 202) After the collision all of those instruments were found to be so adjusted and in such relation, one to the other, as to provide smooth and continued forward motion at a speed from sixty to sixty-five miles per hour. (R. 201, 202, 204, 205) The positions of all of those instruments and their relation, one to the other, is of importance in this case. Proof is thus furnished that no effort was made immediately before the collision to put the instruments in operation to stop the train. The fact that those instruments were so set disproves the principal contention made by counsel upon the trial, before the court below, and in his brief here that immediately before the impact the brakes had been heavily applied by the engineer.

Petitioners' counsel knew that Engineer McDonald died of a heart failure and that he was dead when the impact occurred, but they sought for their own purposes to put life into him immediately before the impact so as to sustain a charge of conscious and willful misconduct. The only hope of sustaining such a charge lay in the possibility that they might persuade the court and jury that McDonald consciously made a service application of the brakes within approximately twelve seconds prior to the impact. The condition of the controls demonstrates that no such application ever took place. Counsel claim that McDonald

was alive approximately twelve seconds before the accident and that his heart failure might have been brought on by consciousness that a collision would shortly occur. They were unable to induce the jury to any such belief.

An autopsy was performed upon the body of McDonald by Colonel Frank Queen, a distinguished pathologist then located at the Bushnell General Hospital, a short distance north of Ogden. Dr. Queen's testimony and his autopsy report were made part of the record by deposition. He gave it as his opinion that the cause of McDonald's death was coronary occlusion, which is a failure of the heart to function by reason of the occlusion of one of the main arteries supplying the heart muscles with blood. (R. 162) He reached that conclusion from a post-mortem examination of the arteries of the heart itself. The conclusion that the heart failure occurred, or the prostration and loss of function attendant upon heart failure took possession of McDonald prior to the wreck, is forced upon us by the fact that he made no effort whatever to escape the effects of scalding steam. By the autopsy report, which is in the record, and which is undisputed and unimpaired by any contrary testimony, the skin on McDonald's face, chest, arms, hands and upper legs was completely cooked by steam. The post-mortem examination likewise demonstrated beyond dispute that the skin was dead before it was burned. (R. 162, 174, 175) If the skin had been alive when the hot steam came in contact with it, there would have been certain chemical and cellular activity, which was wholly missing in this case. Furthermore, if he had been alive when the steam was released upon him, he would not have continued to sit complacently in his place before the throttle. No jury could be permitted to find that McDonald was alive when the escaping steam struck him. His circulation had stopped and he was stone dead. Most important of all is the fact that Hardman, who was trying to attract his attention, got no response whatsoever and saw no effort to apply the brakes. It is true that upon cross examination Dr. Queen and Dr. Ogilvie stated that when the scenery is set for the occurrence of coronary occlusion, its onset might be hastened by shock

or fright. They both testified, however, that the onset may come in the absence of either and both testified that the deceased did not die from shock.

To support the claim of petitioners that McDonald was in possession of his faculties shortly before the collision, counsel undertook to prove that at some point between 7639 and the point of collision, McDonald made a heavy service application of the brakes in the cab of his engine. They produced the conductor, two brakemen, and one express messenger, all of whom were riding in the twentieth and last car of McDonald's train. Each of those witnesses had testified at hearings conducted by the Interstate Commerce Commission and by public authorities of Weber County, Utah. Upon direct examination at those hearings and on direct examination before the trial court, those witnesses gave testimony, which if unchanged by cross or further examination might have justified a jury in finding that McDonald applied the brakes not long before the collision, but each and every one of those witnesses upon cross examination admitted that what they had at one time believed was a service application of the brakes might just as well have been the collision itself. They admitted facts and conclusions which made it plain beyond all doubt that it was the collision which they had at one time mistaken for a service application of brakes. We particularly invite the court's attention to pages 93-103, 105, 110-112, 120-121, 125, 126 of the record for complete confirmation of our contention in this respect. (See Appendix pages I-IX.) What the witnesses might have said upon direct examination in connection with this matter is of no importance, as it is well settled in the laws of Utah and elsewhere that a witness's testimony is no stronger than it is left upon cross examination. Note the following from *Putnam v. Industrial Commission, et al*, 80 Utah 187, 14 P. (2d) 973:

> "* * * the familiar rule is applicable that testimony of a witness on his direct examination is no stronger than as modified or left by his further examination or by his cross-examination."

There is no room for the assumption that if McDonald was conscious and in possession of his faculties when he reached signal 7649 and drove his engine past it that he was guilty of either negligence or willful misconduct for passing that signal. The record makes it plain that such was not the case. The correctness of this view is illustrated by the conduct of Engineer Ware, who drove the engine pulling the first section of train 21. Block signals involved operate on the overlapping principle, which means that an obstacle upon the track will activate the first and second signals immediately behind it. (R. 65) When Engineer Ware, westbound, approached signal 7649, the freight train was stopped between 7629 and 7639. Signal 7649 was, therefore, red, but Ware did not and perhaps could not stop short of the signal. (R. 73, 75) Upon seeing it in stop position and displaying red, he reduced speed and came to an easy stop halfway between 7649 and 7639. He then moved ahead cautiously until he had passed 7639 and was near the rear end of the freight train. (R. 75) What Ware did was in strict conformity with the rules of safety and no claim was ever made that Ware was negligent. The first red signal informs the engineer that danger is ahead at least one full block. It was not negligent for McDonald to pass 7649, but the rules required him to stop in that block as Ware had done. The only fair inference is that McDonald, like Ware, could not see the position of 7649 until he was very near to it and much too close to stop before passing it. When McDonald reached 7649, he may have still been in possession of his faculties. He was then one and one-half minutes in time and one and one-half miles in distance from the point of collision. Fifty to sixty seconds later the red light of 7639 and the frightened shouts of Fireman Hardman failed to arouse him from his oblivion. Ninety seconds later he was sitting dead in his cab, allowing the steam to scald his face and chest. That departure from the normal habits and training of a lifetime, taken in connection with the condition of his heart, as shown upon post-mortem examination, led to the scientific conclusion by Dr. Ogilvie that a heart seizure had prevented normal reaction as McDonald entered the block signal following 7649.

No claim was made that Hardman was guilty of negligence, much less wanton or willful misconduct. When he first became aware of impending danger he endeavored, without success, to arouse the engineer. He then busied himself putting out his fire and controlling the fuel. (R. 88) Counsel for petitioners had as their witness Ross E. Campbell, a fireman expert in the duties of his calling. He testified that under the same conditions a train fireman would have done as Hardman did. (R. 81, 82) Counsel in their brief would have this court believe that Hardman was thrown into a panic when he saw a red light. The record is to the contrary. Hardman began putting things in order in anticipation of a stop. The jury in the exercise of a calm judgment could never conclude that McDonald was in possession of his faculties at a time when otherwise he would have been stopping his train, and any such finding would have been without substantial support in the record, and would have been based upon emotional consideration only. Not only is there no substantial evidence in the record that McDonald was guilty of wanton or willful misconduct, there is no substantial evidence in the record that he was guilty of negligence of any degree. Upon the whole record it is plain that this ghastly tragedy resulted not from the negligence or willful misconduct of McDonald, but from the wholly fortuitous intervention of a heart attack. Apparently, from the post-mortem examination, the stage was set for McDonald to receive a coronary occlusion. There is no evidence that he knew or that anyone else knew of such a setting or that such a setting could have been discovered. The attack might have overtaken him as he sat at his meal, as he read his morning paper, or as he rested in his bed. Fate willed that the attack should come while he was at the throttle of his engine and for that neither he nor the respondent can be charged with willful or wanton misconduct or negligence of any grade.

Conditions of the Free Pass Are Binding Upon Petitioner

The free pass upon which Francis was riding was issued by respondent under authority of the Hepburn Act, 34 U. S. St. at L. 584, 49 U. S. C. A. Sec. 1.[1]

The right of the company to issue the pass for interstate transportation to Francis and his right to accept and use it, both having their origin in an act of Congress to regulate commerce among the states, the rights and relationships created by the issuance and use of the pass are decided and settled by the Federal laws and decisions. The leading case upon this point is *Kansas City Southern Railway Company v. Van Zant*, 260 U. S. 459, 67 L. Ed. 348, decided by this court in 1923. That case involved the effect of a condition in a free pass issued by a railway company for interstate commerce. Van Zant suffered injuries in Missouri while using the pass in interstate commerce. The conditions of Van Zant's pass were substantially the same as those now under review, and the company there averred that the conditions constituted a defense against the charge of negligence. The respondent replied that she received the pass as a resident of Kansas and that she was injured in Missouri and that in both those states such a limitation upon liability as that contained in the pass was unlawful as against public policy. This court ruled that the laws of Kansas and Missouri were without effect and in the course of its opinion announcing the ruling for which we now contend stated:

> "The provision for passes, with its sanction in penalties, is a regulation of interstate commerce to the completion of which the determination of the effect of the passes is necessary. We think, therefore, free passes in their entirety are taken charge of,—not only their permission and use, but the limitations and

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[1] See Appendix.

conditions upon their use. Or, to put it another way, and to specialize, the relation of their users to the railroad which issued them, the fact and measure of responsibility the railroad incurs by their issue, and the extent of the right the person to whom issued acquires, are taken charge of. And that responsibility and those rights, this court has decided, the railroad company can control by conditions in the passes. Antecedently to the passage of the Hepburn Act, we decided that a passenger who accepts a free pass may exempt a carrier from responsibility for negligence, and no public policy is violated thereby. *Northern P. R. Co. v. Adams,* 192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. Rep. 408; *Boering v. Chesapeake Beach R. Co.,* 193 U. S. 442, 48 L. Ed. 742, 24 Sup. Ct. Rep. 515.

"Those cases were considered and applied as giving validity to the stipulation of passes issued under the act in *Charleston & W. C. R. Co. v. Thompson,* 234 U. S. 576, 58 L. Ed. 1476, 34 Sup. Ct. Rep. 964, according thereby freedom of transportation to the possessor of a pass, and giving assurance to the railroad company that its gratuity will not be given the consequences of compensated right * * *."

The rule of the *Van Zant* case as crystallized in the foregoing quotation has continued to be the settled law of the land.

To the same effect as *Kansas City Southern Railway Co. v. Van Zant,* supra, are *Northern Pacific Company v. Adams,* 192 U. S. 440, 48 L. Ed. 513; *Boering v. Chesapeake Beach Railway Company,* 193 U. S. 442, 48 L. Ed. 742; *Charleston and Western Carolina Railway Company v. Thompson,* 234 U. S. 576, 58 L. Ed. 1476. In passing we should like to point out that this court in the case last cited has held that a free pass issued under the statute must be deemed to have been gratuitous.

"As the pass was free under the statute, there is no

question of the validity of its stipulation. This was conceded by the Court of Appeals, as we have stated, and is established by decisions of this court. *Northern Pacific Ry. Company v. Adams*, 192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. Rep. 408; *Boering v. Chesapeake Beach R. Co.*, 193 U. S. 442, 48 L. Ed. 742, 24 Sup. Ct. Rep. 515."

The conditions of the pass were binding upon Francis in his lifetime and are to the same extent binding upon the appellants. It is so held by the federal courts, whose decisions are controlling upon the subject, and by the great weight of other authority. In view of the interstate character of the trip, the pass conditions would have been a complete defense against a claim of negligence by deceased if living, but counsel argue that such provision is invalid as against the cause of action of the heirs. They cite in their brief a few cases reflecting the view of the minority courts on this point. One of the jurisdictions from which they cite authority is California. The California court has at times followed the minority view that survivors may have an action when the injured person would have had no right. But the Supreme Court of California clearly argees with us that in cases involving passes like the one now under review, the Federal decisions control and state decisions are of no force or effect. See *Donnelly v. Southern Pacific Company*, 118 P. (2d) 465, where the California Supreme Court says:

"If congress enacts a statute that embraces the general field but does not cover the matter on which the state has ruled, the state statute or decisions is superseded only if congress intended by such legislation to occupy the entire field, thereby excluding all state control, (citing many cases).

"* * * The state courts are then bound by federal decisional law in the field * * *. In 1906 congress passed the Hepburn Act, 34 U. S. Stat. at Large 584, 49 U. S. C. A. 1 et seq., regulating the issuance of free

passes by interstate carriers * * * the Supreme Court of the United States took the position in *Kansas City Southern Ry. Co. v. Van Zant*, 260 U. S. 459, 43 Sup. Ct. 176, 67 L. Ed. 348, that the Hepburn Act was intended to occupy the entire field of free passes, that it superseded all state law in the field, and that the decisions of the federal courts were therefore controlling on the liability of a carrier for negligence to a holder of a pass containing an exculpatory provision. This court is bound by that decision and must therefore disregard the California law and apply the rules established by the decisions of the federal courts.

"The United States Supreme Court has made it clear that a carrier may validly contract to release itself from liability for negligence to the holder of a free pass. *Northern Pacific Ry. Co. v. Adams*, 192 U. S. 440, 24 S. Ct. 408, 48 L. Ed. 513; *Boering v. Chesapeake Beach R. Co.*, 193 U. S. 442, 24 S. Ct. 515, 48 L. Ed. 742; *Charleston & Western Carolina Ry. Co. v. Thompson*, 234 U. S. 576, 34 S. Ct. 964, 58 L. Ed. 1476; *Kansas City Southern Ry. Co. v. Van Zant*, supra.

"Plaintiff contends that while the release is effective as to ordinary negligence, it is not effective as to gross negligence. The federal courts, however, have rejected any distinction between negligence and gross negligence; they recognize no degree of negligence. *New York Central Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; the *New World v. King*, 16 How. 469, 14 L. Ed. 1019; *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U. S. 489, 494, 23 L. Ed. 374; *Westre v. Chicago, M. & St. Paul Ry. Co.*, 8 Cir., 2 F. (2d) 227, and cases there cited."

While recovery for death may be had under workmen's compensation laws without regard to fault on the part of either employer or employee, recovery may not be had under wrongful death statutes except upon proof of breach of

duty to deceased. Such is the clear holding of this court in *Northern Pacific Railway Co. v. Adams*, supra. Adams was killed while riding a free pass in interstate commerce. His heirs brought suit under the death statute of Idaho which was substantially identical to the Utah statute. The pass was set up as a defense. Plaintiffs asserted that the pass was no defense against them, inasmuch as they had a right of action separate and distinct from the one which would have been enjoyed in his lifetime by decedent if he had suffered injuries instead of death. In disposing of that point this court said:

> "A statute of Idaho reads as follows:
> " 'When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or, if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as, under all the circumstances of the case, may be just.' Idaho Rev. Stat. Sec. 4100."
>
> "As the negligence of the company, found by the jury to have caused the death, as well as the resulting death, took place in Idaho, the plaintiffs' right of action rests on the statute of that state. What is the scope and meaning of that statute? The circuit court charged the jury:
>
> "'You are not to consider what was the duty of this carrier toward Mr. Adams, who was killed, but the duty which the defendant owed to these plaintiffs; and the duty which they have the right to exact from the defendant in this case is the same duty which the defendant company owed to the public in general.'
>
> "In other words, although it should appear that the company in no respect failed in its duty to the de-

ceased, it could yet be held responsible to the widow and son for the damages they suffered by reason of the death. But that is a misconception. Their right of action arises only when his death is caused by 'the wrongful act or neglect.' If there be no omission of duty to the decedent, his heirs have no claim. Suppose an individual is wantonly assailed, and, in order to protect his own life, is obliged to kill the assailant—may the heirs of the decedent have that act of taking life, rightful as against the decedent, adjudged wrongful as against them, and recover damages from one who did only that which his duty to himself and family required him to do? The statute does not provide that when one's life is taken by another the heirs of the former may recover damages, but only when it is wrongfully taken,—that is, when it is taken in violation of the rights of the decedent; wrongful as against him. 'Neglect' stands in the same category with 'wrongful act.' It implies some ommision of duty.

"The two terms, therefore—wrongful act and neglect,—imply alike the omission of some duty, and that duty must, as stated, be a duty owing to the decedent. It cannot be that, if the death was caused by a rightful act, or an unintentional act, with no omission of duty owing to the decedent, it can be considered wrongful or negligent at the suit of the heirs of the decedent. They claim under him, and they can recover only in case he could have recovered damages had he not been killed, but only injured. The company is not under two different measures of obligation,—one to the passenger and another to his heirs. If it discharges its full obligation to the passengers, his heirs have no right to compel it to pay damages.

"Did the company omit any duty which they owed to the decedent? He was riding on a pass which provided that the company should 'not be liable, under any circumstances whether of negligence of agents

> or otherwise, for any injury to the person.' He was a free passenger, paying nothing for the privilege given him of riding in the coaches of the defendant. He entered those coaches as a licensee, upon conditions which he, with full knowledge, accepted. He was not a passenger for hire, such as was held to be the condition of the parties recovering in *New York C. R. Company v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, and *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535. • • •"

In the third paragraph of the above quotation [page 449 (U. S.), 516 L. Ed.)], the Circuit Court stated in seven lines what counsel for petitioners have labored over thirty pages to say in their brief. This court rejected the concept there set forth as "a misconception."

The *Adams* case has never been overruled or modified by this court, but was followed in *Michigan Central Railroad v. Vreeland*, 227 U. S. 59, L. Ed. 417; *Kansas City Southern v. Van Zant*, supra; and *Flynn v. N. Y., N. H. & H. Railroad*, 283 U. S. 53, 75 L. Ed. 837. In the *Vreeland* case this court considered the matter at length and concluded that while the cause of action given to the heirs is entirely distinct from the one held in his lifetime by deceased, nevertheless, there is no cause of action in the heirs, unless there would have been one in deceased had he lived. In reaching that conclusion, this court said:

> "But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury. Tiffany, Death by Wrongful Act. Sec. 124; *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 231, 38 L. Ed. 422, 14 Sup. Ct. Rep. 579; *Read v. Great Eastern R. Co.*, L. R. 3 Q. B. 555, 9 Best. & S. 714, L. J. Q. B. N. S. 278, 18 L. T. N. S. 82, 16 Week. Rep. 1040; *Hecht v. Ohio & M. R. Co.*,

132 Ind. 507, 32 N. E. 302; *Fowlkes v. Nashville & D. R. Co.*, 9 Heisk. 829; *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271; *Southern Bell Telph. & Teleg. Co. v. Cassin*, 111 Ga. 575, 50 L. R. A. 694, 36 S. E. 881."

In *Mellon v. Goodyear*, 277 U. S. 335, 72 L. Ed. 906 (Reversing 121 Kan. 392, 247 Pac. 446), this court had before it the question whether a settlement by an employee in his lifetime barred an action after his death by his heirs for his death. The court reviewed the authority upon the subject at great length and followed the rule announced in the *Vreeland* case. In the course of a most illuminating opinion upon the subject the court said:

"Concerning that section, Vreeland's case, supra, declares: 'But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.' And no later opinion here has given expression to any other view.

"By the overwhelming weight of judicial authority, where a statute of the nature of Lord Campbell's Act in effect gives a right to recover damages for the benefit of dependents, the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such injury. A settlement by the wrongdoer with the injured person, in the absence of fraud or mistake, precludes any remedy by the personal representative based upon the same wrongful act. Construing the statute of Kansas, the Supreme Court of that state seems to have accepted this generally approved doctrine. *Fuller v. Atchison, T. & S. F. R. Co.*, 124 Kan. 66, 257 Pac. 971.

"'The cases supporting this view, from courts of last resort in twenty-one states, Canada and England,

are collected in a note following the first opinion of the supreme court of Kansas in the present case, reported in 39 A. L. R. 579. And in Tiffany on Death by Wrongful Act, 2d Ed. Sec. 124, the rule (with supporting authorities) is thus broadly stated—

> " 'If the deceased, in his lifetime, has done anything that would operate as a bar to a recovery by him of damages for the personal injury, this will operate equally as a bar in an action by his personal representatives for his death. * * *' "

Subsequently this court reaffirmed the foregoing rule in *Flynn v. New York, N. H. & H. R. Co.*, 283 U. S. 75 L. Ed. 837, and stated:

> "Obviously Flynn's right of action was barred, but it is argued that the right on behalf of the widow and children is distinct; that their cause of action could not arise until Flynn's death, and that therefore the two years did not begin to run until September 1, 1928. But the argument comes too late. It is established that the present right, although not strictly representative, is derivative and dependent upon the continuance of a right in the injured employee at the time of his death. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 70, 57 L. Ed. 417, 421, 33 S. Ct. 192, Ann. Cas. 1914C, 176. On this ground an effective release by the employee makes it impossible for his administrator to recover. *Mellon v. Goodyear*, 277 U. S. 335, 344, 72 L. Ed. 906, 910, 48 S. Ct. 541. The running of the two years from the time when his cause of action accrued extinguishes it as effectively as a release, *Engel v. Davenport*, 271 U. S. 33, 38, 70 L. Ed. 813, 817, 46 S. Ct. 410, and the same consequence follows. Our conclusion that this action could not be brought is required by the former decisions of this court."

This court further affirmed the rule by its decisions in

Frese v. C. B. & Q. Railway, 263 U. S. 1, 68 L. Ed. 131; and *Reading Company v. Koons,* 271 U. S. 58, 64, 70 L. Ed. 835. Typical of the host of other cases going to make up the overwhelming weight of authority referred to by this court in *Mellon v. Goodyear,* supra, are: *James Baird Co. v. Boyd.* 41 F. (2d) 578 (CCA 4th); *Seaboard Air Line Ry. v. Oliver,* 261 Fed. 1, (CCA 5th); *Western Union v. Preston,* 254 Fed. 229, (CCA 3rd); *Russell v. Cox,* 148 P. (2d) 221, (Idaho 1944). (The Idaho case just cited is interesting because it reaffirms the interpretation of the Idaho death statute put upon it by this court in *Northern Pacific v. Adams,* supra); *Ryan v. Poole,* 47 P. (2d) 981, (Washington); *Sewell v. A. T. & S. F. Railway Company,* 96 Pac. 1007, (Kansas). (This decision of the Supreme Court of Kansas is interesting also because it discusses and interprets its earlier opinion in *Chicago R. I. & P. R. Co. v. Martin,* 53 Pac. 461. It is noted that petitioners in their brief rely upon 25 C. J. S. 1145, Death, and authorities therein cited. C. J. S. lists these authorities as *Adams v. Northern Pacific R. Co.,* 116 Fed. 324, (C. C. A. Washington), and *Chicago R. I. & P. R. Co. v. Martin,* supra. This *Adams* case was reversed by *Northern Pacific v. Adams,* supra, and the *Martin* case was overruled by *Sewell v. A. T. & S. F. Railway Company,* supra.) *Mason v. Union Pacific Railroad Company,* 7 Utah 77, 24 Pac. 796.

The grotesque length to which the logic of the petitioners' contention would carry them is demonstrated by the case of *Ryan v. Poole,* supra, which arose in the state of Washington and was ultimately decided by the Supreme Court of that state. There a brigand with felonious intent undertook to rob a milk truck. While engaged in this criminal act he was killed by the truck driver. His heirs, completely deceived by the theory now espoused by counsel for petitioners sought to recover for the death of the deceased on the theory that their cause of action came into existence only upon his death and was therefore freed of any impairment attaching to decedent's conduct in the circumstance which brought his death. This is what the Supreme Court of Washington thought about it:

"It is also generally held, and the decisions of this court are to the same effect, that, if a deceased could not have recovered damages for his injury had he survived, his heirs or personal representatives cannot recover, because their right of recovery is dependent upon the right which the deceased would have had had he survived. If the deceased had no cause of action, none accrues to his heirs or personal representatives.

"The words 'wrongful act or neglect,' used in the statutes of this nature in defining the quality of the act causing the injury and death, it seems to be universally agreed by the courts, mean wrong or neglect as against the deceased; that is, in the sense that the deceased could have recovered damages for the injury resulting in his death.

"Had Emmett C. Ryan survived his injury, and brought an action therefor, it is clear that he could not have prevailed, because at the time of the injury he was engaged in the performance of an unlawful and criminal act. The right of the appellant to recover being dependent upon the deceased's right, had he survived, it necessarily follows that the demurrer to the complaint was properly sustained. This may be measuring the rights of the heirs and personal representatives by the personal disability of the deceased, had he survived, but, if it be so, it is a conclusion which the settled law requires."

To show that the rule announced by this court in the cases which we have just discussed is regarded as the controlling rule, we invite the court's attention to certain well-respected texts: Restatement of the Law of Torts, Vol. 4, Section 925 page 639; Tiffany, Death by Wrongful Act, Second Edition, Sections 62 and 63, page 131; 16 American Jurisprudence, 61 and 78; 17 Corpus Juris, 1199-1201; Robert's Federal Liability of Carriers, Vol. 2, 2nd Ed., Section 900, page 1756. See also the annotation at 39 A. L. R. 579.

The wrongful death statute of Utah[3] under which petitioners claim is, as its name implies, an act authorizing an action for wrongful death. A wrongful death results from failure to discharge a duty owing the decedent. The free pass limited in a lawful manner the duty owing from the company to Francis as a result of which in the absence of willful misconduct there was no breach of duty and hence no wrongful death. This principle is recognized by all of the decisions and texts above cited, but is entirely overlooked by counsel in their brief. Counsel in their brief referred to two Utah cases: *Mason v. Union Pacific Railroad Company*, supra, and *Halling v. Industrial Commission*, 71 Utah 112, 263 Pac. 78. The *Mason* case is relevant because it involved the wrongful death statute of Utah. In that case, however, the Supreme Court of Utah stated:

> "These sections give to the personal representatives or heirs a right of action against the person whose wrongful act or neglect causes the death of another *when* the deceased, *if he were living*, could maintain one. *If the person sustaining the direct injury from the wrongful act or neglect had a right of action for it*, his heirs have one for their injury for his death caused by the same act or neglect." (Italics ours)

The *Halling* case, however, is clearly distinguishable from the case at bar, because it arose under the workmen's compensation law of Utah.[4] Any discussion of the wrongful death statute as distinguished from the compensation act must be regarded as dictum. The right to compensation in the *Halling* case, whether in the employee or in his dependents, in no sense depended upon wrongful injury or death. The fact of accidental injury or accidental death within the course of employment was all that was material there. The difference between compensation cases and cases for wrongful death is clearly recognized by the courts.

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[3] See Appendix.
[4] See Appendix.

For instance, in *Lewis v. Connolly Contracting Co.*, 264 N. W. 581, the Supreme Court of Minnesota, while recognizing the rule as announced in *Vreeland's* case, pointed out the distinction between wrongful death cases and those arising under the workmen's compensation act. Note this language from the Minnesota decision:

> "The court in the *Vreeland* Case further said: 'But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.'
>
> "This clearly refers only to actions at law to recover for death caused by negligence or tort of the employer. It should have no application to a proceeding under a Workmen's Compensation Law such as ours, where the proceeding is not based on any original wrong. The cases cited under that quoted paragraph are all actions to recover for wrongful death."

From the foregoing it will be seen that the controlling authority upon the subject sustains the contention that the conditions upon the pass which was given gratuitously to Francis for an interstate trip stand as a bar against any recovery for injury to or death of Francis by reason of the negligence of defendant company as distinguished from willful or wanton misconduct.

Jury Properly Drawn

Rule 59(b) of the Rules of Civil Procedure provides that a motion for a new trial shall be served not later than ten days after entry of judgment. Sub-section (c) of the same rule provides that when affidavits are relied upon they must be served with the motion; and sub-section (d) provides that not later than ten days after judgment the trial court on its own initiative may grant a new trial.[1]

[1] See Appendix.

Judgment was entered in this case on May 2, 1946. On May 8, 1946, and within the time fixed by the rule, a motion for new trial was served upon respondent. That motion in no way questioned the manner in which the jury list was made up or the panel selected. On June 13, 1946, thirty-one days after the time within which to file the motion for a new trial had expired, petitioners filed another motion for new trial. By paragraphs 16, 17, 18 and 19 of the new motion they attacked the jury panel, as well as the particular jury which tried the case. Then, for the first time, petitioners raised objection to the jury. Thereafter on June 18, 1946, thirty-six days after the time within which the rules permit the filing of such affidavits, petitioners filed certain affidavits purportedly in support of their motion for new trial. Respondent moved to strike the new motion for new trial and particularly paragraphs 16, 17, 18 and 19 thereof, and moved to strike the affidavits upon the ground that they were served and filed out of time. When the motion for new trial was called for argument, respondent renewed its motion and urged upon the trial court that the amended motion for new trial, and particularly paragraphs 16, 17, 18 and 19 thereof and the affidavits filed on June 18, 1946, were not properly before the court. (R. 44, 223-224) The same matter was called to the attention of the Circuit Court of Appeals. No ruling was ever made upon the motion to strike, but by its decision the Circuit Court of Appeals clearly recognized that the motion and affidavits had been filed after the time fixed by the governing rules of procedure. (R. 279, 280)

Counsel for petitioners have long practiced before the trial court. They maintain their offices within one block of the clerk's offices. Trial of this case was called for April 26, 1947. Approximately two weeks before that time the clerk of the court mailed to counsel for petitioners a list of the names from which the trial jury would be selected. (R. 234) Thereafter during the business hours of each day the clerk's office was open and persons were in attendance to answer any questions propounded concerning the jury. Counsel were free during all that time to make such inquiry

as they might deem useful. It does not appear from the record that they ever bothered to make any such inquiry.

It does appear though, that counsel, possessed of the list of jurymen sent them by the clerk, came to court on the appointed day to participate in the selection of a jury. Upon convening of court counsel informed the trial judge that they were not ready to go to trial but were ready to select a jury. (R. 46) Thereupon the requisite number of veniremen were called into the box and a jury was drawn and accepted by both sides. (R. 46, 62)

Following the exercise of challenges, counsel for both sides accepted a jury on April 26th. During the selection of the jury and prior thereto there was never a breath of criticism from petitioners' counsel as to the makeup of the panel or the competency of those upon the panel to serve. There never was an inkling that counsel might speculate on the jury as constituted for a verdict and then if disappointed seek to question the competency of the entire panel. The twelve persons selected by counsel for both sides to try the case were: Parley N. Winn, an employee in a feed store in Richmond, a farming village; Percy B. Wright, an employee of Bennett Glass and Paint Company, a corporation in the city of Ogden; Kenneth K. Leonardson, a grocer in the farming village of Kaysville; Jack Pogue, employed to drive a freight truck between Salt Lake City and Southern Utah; Marjorie McMurrin, a housewife from a farming community in Northern Utah; Theron R. Covey, manager of a dance hall in Salt Lake City; Carl W. Huhl, an employee of Z. C. M. I. Department Store in Salt Lake City; Lourie A. Bennett, manager of a local retail coal office in Salt Lake City; Vesta Cahoon, wife of a letter carrier; William Evans, Jr., employed in a garage in Logan, an agricultural community in Northern Utah; M. L. Jones, who repaired refrigerators in Bountiful; a farming community north of Salt Lake City; and O. Early House, a salesman in Tooele, an agricultural and mining village in Western Utah. Inasmuch as a jury consists of only twelve persons, it certainly cannot be said that the foregoing twelve

did not constitute a cross-section, representative of the activities of the State of Utah.

After the selection of the jury, the actual taking of evidence did not begin until April 29th. Two and one-half full days passed between the time counsel knew who their jury was to be and the taking of any evidence. The taking of evidence began on April 29th and was concluded on May 1st. The jury was instructed and retired to deliberate on the afternoon of May 1st. It returned its verdict into the court on the morning of May 2nd. During all of those proceedings there was never a word of criticism of the jury panel or the method of its selection. Settled law and the requirements of fair play demand that counsel make their objections before, not after, verdict. *Queenan v. Territory of Oklahoma,* 190 U. S. 48, 47 L. Ed. 1175; *Holmes v. U. S.,* 134 F. (2d) 125, (C. C. A. 8th); *King v. Leach,* 131 F. (2d) 8, (C. C. A. 5th); *Spivey v. U. S.,* 109 F. (2d) 181, (C. C. A. 5th); *Carruthers, et al v. Reed,* 102 F. (2d) 933, (C. C. A. 8th); *Needham v. U. S.,* 73 F. (2d) 1, (C. C. A. 7th); *Union Electric Light and Power Co. v. Snyder Estate Co.,* 65 F. (2d) 297, (C. C. A. 8th); *Zito v. U. S.,* 64 F. (2d) 772, (C. C. A. 7th); *Strang v. U. S.,* 48 F. (2d) 1006, and 53 F. (2d) 820, (C. C. A. 5th); *Bush v. U. S.,* 16 F. (2d) 709 (C. C. A. 5th); *Browder v. Cook,* 59 F. Supp. 675, (D. C. Idaho); *U. S. v. Peterson,* 24 Fed. Supp. 470, (D. C. Pa.); *Monday v. State,* 23 S. W. (2d) 656, (Tenn.); *Knauf v. State;* 1 S. W. (2d) 619, (Texas); *Roush v. U. S.,* 47 F. (2d) 444, (C. C. A. 5th). See also *Bennett v. Tintic Iron Co.,* 9 Utah 291, 34 Pac. 61.

The Rules of Civil Procedure by rule 59 provide for the filing of motions for new trial. Rule 59(b) provides that "motion for a new trial shall be served not later than ten days after the entry of judgment." The only exception provided by the rule is to be found when the motion for a new trial is grounded on newly discovered evidence, in which case the motion may be made after the expiration of the period fixed by the rule "with leave of court obtained on notice and hearing and on a showing of due diligence."

On June 18th, five days after filing the new motion, petitioners undertook to serve upon respondent and to file with the court numerous affidavits in support of paragraphs 16, 17, 18, and 19 of their new motion. Rule 59(c) provides in part: "When a motion for a new trial is based upon affidavits, they shall be served with the motion * * *." So if the Rules of Civil Procedure mean what they say, and the rules which we invoke seem to be free of any ambiguity, the motion filed on June 13th and the affidavits filed on June 18th, 1946, were not properly before the trial court and should not be considered a part of the record on appeal. *Marshalls' U. S. Auto Supply, Inc., v. Cashman,* 111 F. (2d) 140, (C. C. A. 10th); *Safeway Stores, Inc., v. Coe,* 136 F. (2d) 771, (C. A. for D. C.); *Freid v. McGrath,* 133 F. (2d) 350, (C. A. for D. C.); *U. S. v. Newbury Mfg. Co., et al,* 123 F. (2d) 453, (C. C. A. 1); *Wolpa v. U. S.,* 84 F. (2d) 829, (C. C. A. 8th); *Peterson v. Chicago G. W. Ry. Co.,* 3 F. R. D. 346, (D. C. Neb.); *Aydia v. Denver & Rio G. R. Co., et al,* 45 Utah 459, 146 Pac. 559; *Luke v. Coleman,* 38 Utah 383, 113 Pac. 1023; *Blue Creek Land and Livestock Co. v. Anderson,* 35 Utah 61, 99 Pac. 444.

Counsel made a belated effort to bring themselves within *Thiel v. Southern Pacific,* 328 U. S. 217, 66 S. Ct. 984. That case does not support counsels' position because in the *Thiel* case plaintiff raised and insisted upon his objection to the jury panel before a trial jury was ever drawn and to protect himself against waiver, pressed his objection to the jury panel at all appropriate times thereafter.

Counsel in this case never had any faith or confidence in their motion for new trial. When the matter came on for argument before the trial judge, counsel for petitioners at one point said:

> "It may be, your Honor might feel these affidavits are untimely, that the motion for a new trial should have been more complete and full at the time it was made. It may be the court will feel that the jury

should have been challenged before the trial was started. I cannot change the record on that. * * *"

There was clear recognition that his motion was filed out of time and that his objection should have been made before the trial started.

To summarize briefly, it thus appears without contradiction in the record that appellants were not only provided well in advance of trial with a list of the jurors from whom the jury finally selected would be drawn, but were afforded ample time and opportunity to discover any and all defects or irregularities which might exist in the manner of the original selection of all jurors for jury duty in the court. It likewise appears that petitioners announced themselves as being ready to select a jury and after such selection passed the jury for cause. Never once did petitioners give any indication of any dissatisfaction regarding the jury until after judgment had been entered and after their motion for a new trial had been filed. Then the counsel filed their belated motion for a new trial and called upon the court to correct an "apparent manifest" miscarriage of justice. It has been shown that petitioners' new motion and subsequent affidavits raising the jury question came too late. Even with all this, one additional fundamental principle of law precludes this matter being now properly before this court, for it is well settled that an order of the trial court denying a new trial is not reviewable on writs of error, it being a discretionary matter with the trial court and except for a clear abuse of that discretion such ruling will not be disturbed. *U. S. v. Socony-Vacuum Oil Company*, 310 U. S. 150, 84 L. Ed. 1129; *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 77 L. Ed. 439; *Blytheville Cotton Oil Co. v. Kurn*, 155 F. (2d) 467, (C. C. A. 6th 1946); *Lemly v. Christopherson*, 159 F. (2d) 291, (C. C. A. 5th, 1945); *Jordan v. Fed. Farm Mtg. Co.*, 152 F. (2d) 642, (C. C. A. 8th, 1945); *Gerson v. Anderson-Prichard Production Corp.*, 149 F. (2d) 444, (C. C. A. 10th, 1945) (citing *Long v. U. S.*, 133 F. (2d) 652, (C. C. A. 10th)); *Daffinrud v. U. S.*, 145 F. (2d) 724, (C. C. A. 7th, 1944);

U. S. v. Bransen, 142 F. (2d) 232, (C. C. A. 9th, 1944); *McDonough et al v. U. S.*, 299 Fed. 30, (C. C. A. 9th, 1924). The action of the court below in hearing all of petitioners' evidence, affidavits and argument on this jury question while yet reserving its ruling on the motions to strike and the objections of respondent that such were never properly before the court makes it "manifestly apparent" that petitioners' claim of abuse of discretion is untenable. See *U. S. v. Socony-Vacuum Oil Co.*, supra, *McDonough et al v. U. S.*, supra.

WHEREFORE, it is respectfully submitted that the petition for writ of ceritorari in this case should be denied.

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APPENDIX

Cross Examination of Clarence A. Russell, Head Brakeman on Second 21

"A. There were 20 cars in our train and after the collision some of them were criss-crossed over the track; some of them came out of the train and were thrown off the track and in each case where that occurred there was a break in the train. As the car left the train and criss-crossed, that shortened the train up.

Q. And the buckling out of the train of a car from time to time could well account for those lurches you described, couldn't it?

A. Possibly.

Q. Did you account for it in that way?

A. I don't know.

Q. But there were three separate lurches?

A. Distinct shocks, yes, sir.

Q. And they could have occurred by the buckling out of the train of certain cars?

A. Yes, sir." * * * (R. 98)

"Q. There is an anglecock on the front of the engine, isn't there?

A. Yes, sir.

Q. So if it should happen to hook up with another engine you could connect up the air between them?

A. Yes, sir.

Q. And if you break that angelcock you set the air in the whole train, don't you?

A. Immediately, yes, sir.

Q. What?

A. Immediately, yes, sir.

Q. So just the instant you break the anglecock off the front of that engine, the air went back to the rear car you were in faster than your train was moving, didn't it?

A. I don't know.

Q. Don't you know as an engineer—as a railroad man—that it does?

A. I don't know.

Q. You have no opinion?

A. No, sir.

Q. What is your judgment as to whether the air moves back from that engine to the 20th car at a speed faster than 40 miles an hour?

A. It is possible, yes, sir.

Q. Don't you think it does?

A. I think so.

Q. So just the minute that anglecock cracked, that train in front—or the air went on the end of your car, didn't it?

A. I don't know.

Q. Do you think it did or didn't?

A. I don't know.

Q. What would you expect when you break the train-line, whether the air would go back into your car or not?

A. If the train line is broken the brakes apply immediately.

MR. RAY: Isn't any question about it. One other question:

Q. The car you were in was the last car, wasn't it?

A. Yes, sir.

Q. And it stayed on the track?

A. Yes, sir.

Q. So that it was subject to emergency application of the brakes, wasn't it?

A. Yes, sir.

Q. And it did go into emergency, didn't it?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. Did you hear engineer Ware say that it has to go into emergency once the air line is broken?

A. If it is broken, yes, sir.

Q. That is true, isn't it?

A. Yes, sir.

Q. There is no doubt your train was broken, is there? You have testified you saw cars criss-crossed over the tracks, haven't you?

A. Yes, sir.

Q. So you do know the emergency went back into your car, don't you?

A. Yes, sir.

Q. Now, you also know, do you not Mr. Russell, that your car moved five or six hundred feet after the first impact?

A. Yes, sir. * * *" (R. 98, 100)

"Q. Now, you have no doubt that the emergency set in your car, do you?

A. I didn't feel the emergency application.

Q. As you sit there right now you have no doubt it did, do you?

A. There is no doubt.

Q. You have no doubt that the emergency would be set in your car if the anglecock was knocked off the front of your locomotive by the collision, have you?

A. As soon as the train line was broken." • • •
(R. 101-102)

"A. I appeared at the inquest held in Ogden on the 16th day of January, 1944, and gave testimony. There were 9 cars derailed out of the train, with 11 cars standing upright.

Q. I want to read a part of the testimony you there gave; see if I read it correctly. Were you asked this question: 'Mr. Russel, you have a good many years as a brakeman and conductor, and you know the application of brakes, do you not?' And you answered: 'Approximately.'

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. 'And from your experience of having it applied at various times and conditions'? Your answer was: 'Yes, sir.'

A. Yes, sir.

Q. Then this question: 'This heavy application you referred to, was that in your opinion,—and this leads to the question one of the jurors asked,—was that, in your opinion, the application of the brakes by some one, or could it have happened by the impact?' Do you remember that question?

A. Yes, sir.

Q. And your answer: 'I cannot say.' Do you remember giving that answer?

A. Yes, sir.

Q. And then the next question: 'You do not know?' And your answer: 'No, sir.' You gave those answers at the inquest?

A. As I remember, yes, sir.

It is my position now that I am unable to say whether or not the application of brakes which I felt resulted from someone applying them or from the impact itself." (R. 102)

Upon recross examination Brakeman Russell testified:

"I don't know whether the cars that were pinched out of the train went out all at once or at intervals. If they went out one or two at a time over a very brief period, that would check the movement of the train, would probably cause it to lurch." (R. 105)

Cross Examination of Dale Altman, Rear Brakeman on Second 21

"A. I testified at the Interstate Commerce Commission hearing on January 6, 1945, and 10 days later I appeared and gave testimony at the inquest and I was sworn in both instances. My first impression was that there was a lapse of time between the application of the brakes and this shock or lurch, which I referred to of 30 to 35 seconds. I later witnessed an experiment and revised my idea of the time which elapsed to approximately 12 seconds.

Q. Now, at the time you testified on January 6th and again on January 16th, it never had occurred to you that there was any emergency application of the brakes in that car had it?

A. No, I couldn't tell whether it was; as far as I know there was no emergency application.

Q. It had not occurred to you, had it?

A. No.

Q. But you know now when you think of it and you know your train was broken in two, you know there was, don't you?

A. Well, there would have to be to break the train line.

Q. You know there was now as you sit here and think about it in that light, don't you?

A. Well, I don't know for sure.

Q. Well, you found your air was working all right when you left Ogden?

A. Yes.

Q. And you know when the trainline breaks any place you just cannot help setting the emergency brakes, don't you?

A. That is right.

Q. So don't you have to conclude now, Mr. Altman, that there was emergency application on that car?

A. Well, that is the ultimate result, yes, sir.

Q. So you agree with us on that?

A. Yes, sir." * * * (R. 110-111)

"A. I recall my testimony given at the inquest.

Q. Do you remember this question being asked to you: 'Was it the type of application that might have been caused by the impact?' Do you remember that question?

A. I don't recall it now.

Q. Would you say that was or was not put to you?

A. Yes, I imagine it was.

Q. And your answer: 'I wouldn't be able to say as to that, it is possible.' Do you remember that?

A. Yes, sir.

Q. And then the question: 'Have you formed any independent opinion on that point?' And your answer: 'No, I wouldn't pass an opinion on it.' Do you remember that?

A. That is right.

Q. And is that still correct?

A. Yes, sir.

Q. This application of the brakes that you felt may or may not have been caused by the impact?

A. That is right. I have no way of knowing." (R. 112)

Cross Examination of James W. Welch, Conductor on Second 21

"Q. Mr. Welch, you have appeared at both the Interstate Commerce Commission hearing and the inquest, did you not?

A. Yes, sir.

Q. Would you now state—having thought about the matter and having heard the testimony given here today—Mr. Welch would you now state it must have been an emergency application of the brakes on your car?

A. Prior to that wreck, I didn't know what an emergency application was like on a passenger train. Since that time I have had two or three occasions to witness an emergency stop and there was very little difference in the action from these emer-

gency stops that have been made recently with me on a passenger train and that one there; they both had the same effect. I might add this: there is a difference between an emergency stop—the effects of an emergency stop—on a passenger train and on a freight train.

At the time of the application I was busy with my book work. My attention was focused upon what I was doing and my attention was first distracted by the application of the brakes. Since that time I have had experience with emergency stops on passenger trains.

Q. Now, from that experience are you now able to say that the applications of the brakes you felt on this occasion were substantially the same as those emergency applications you felt since then?

A. That is right.

Q. Your answer is yes?

A. Yes, sir.

Q. And you also know from your long experience in train service that by reason of the breaking of your train it was inevitable that the emergency brake would set on your car?

A. Well, any time a trainline is broken on a train, on any part of the train from the engine to the rear end, will cause an emergency action.

Q. Now, so then I take it, Mr. Welch, that the application of the brakes which you felt on this occasion may very well have been caused by the impact?

A. As far as I know." • • • (R. 120)

(Question read as follows:) Now, if there was only one application of air in view of the fact that this train

line was broken all to pieces, that one single application must have been an emergency, must it not, Mr. Welch?

A. Yes." * * * (R. 125)

"Q. But you felt only one application of the brakes?

A. Yes.

Q. And there being only one you are satisfied now that was an emergency application, isn't that correct?

A. I think so." (R. 126)

Hepburn Act

49 U. S. C. A. Sec. 1 (7) (as amended June 19, 1934, c. 652, § 602 (b), 48 Stat. 1102; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § § 2, 3 (a, b), 4, 54 Stat. 899, 900, 901.)

"No common carrier subject to the provisions of this chapter, shall, directly or indirectly, issue or give any interstate free ticket, free pass or free transportation for passengers, except to its employees * * * and the families of any of the foregoing * * *."

Utah Wrongful Death Statute

Utah Code Annotated, 1943:

"104-3-11. Death of Adult—When Heir and Representative May Sue.

"Except as provided in chapter 1, of Title 42, when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death, or, if such person is employed by another person who is responsible for his conduct, then also against such other person. If such adult person has a guardian at the time of his death, only one action can

be maintained for the injury to or death of such person, and such action may be brought by either the personal representatives of such adult deceased person, for the benefit of his heirs, or by such guardian for the benefit of the heirs as provided in the next preceding section. In every action under this and the next preceding section such damages may be given as under all the circumstances of the case may be just. (C. L. 17, § 6505.)"

Workmen's Compensation Act of Utah

Utah Code Annotated, 1943.

"42-1-43. Compensation for Industrial Accidents to Be Paid.

"Every employee mentioned in section 42-1-41 who is injured, and the dependents of every such employee who is killed, by accident arising out of or in the course of his employment, wheresoever such injury occurred, provided the same was not purposely self-inflicted, shall be entitled to receive, and shall be paid, such compensation for loss sustained on account of such injury or death, and such amount for medical, nurse and hospital services and medicines, and, in case of death, such amount of funeral expenses, as is herein provided. (L. 19, p. 154, §3113.)"

Federal Rules of Civil Procedure

28 U. S. C. A., following Section 723c:

"Rule 59. New Trials

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a

jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgement if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has ten days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 400

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Petitioners,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION,

Respondent

SUPPLEMENT TO BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT.

PAUL H. RAY,
S. J. QUINNEY,
Counsel for Respondent.

RAY, QUINNEY & NEBEKER
and
GRANT C. AADNESEN,
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In petitioners' brief it is contended that under the wrongful death statute of Utah the right of action of the heirs or survivors cannot be impaired by anything done or omitted prior to his death by decedent. Petitioners' chief reliance is *Halling* v. *Industrial Commission*, 71 Utah 112, 263 Pac. 78. In respondent's brief in opposition to petition for certiorari, it is contended that the *Halling* case is applicable only in workmen's compensation cases and that there can

be no recovery by the heirs under the wrongful death statute unless the deceased, if he had been living, could have maintained a cause of action. That respondent's contention is correct is now made clear beyond any dispute by decision of the Supreme Court of Utah handed down November 3, 1947, in *Alta J. Van Wagoner, et al.*, v. *Union Pacific Railroad Co.* It was there contended by the plaintiffs that under the wrongful death statute of Utah they had a cause of action for death against the railroad wholly distinct from any cause of action the deceased had in his lifetime, and that, therefore, contributory negligence of the deceased could not be relied upon as a defense against the heirs. In disposing of that contention the Supreme Court of Utah said:

> "Appellants rely on the cases of Mason *v.* U. P. R. R. Co., 7 Utah 77, 24 P. 796, and Halling *v.* Industrial Comm., 71 Utah 112, 263 P. 78, which, in substance, hold that a claim for death is a separate and independent cause of action and is not a continuation of the right of action of the injured party for personal injuries. The death creates a new cause of action for the loss suffered by the heirs by reason of death, and only comes into existence upon the happening of death.
>
> "If we follow the reasoning of these two last cited cases, the conclusion is inevitable that they do not overrule the decision in the Helfrich case. For the purpose of clarifying the statement, assume that the deceased had only been injured in this collision. The right of action would run in his favor, and the defense of contributory negligence would have been properly submitted. The right of action running to the appellants in this case is founded on the same unlawful acts of the defendant, but the loss and damages suffered by them arise out of the death of the deceased. The legislature has thus said the right of action vests in the heirs-at-law if death ensues but it does not say the rights of the third parties are modified, altered, or changed. On the contrary, it bases recovery on the wrongful death by

another and wrongful is used in the sense of wrongful as against the deceased, and does not include those situations where the deceased either solely or proximately contributes negligently to his own death. This court is of the opinion the legislature did not intend to change the rules of substantive law and deny to litigants the right to defend on the ground of contributory negligence. For the purposes of this suit, all that Section 104-3-11, U.C.A., 1943, grants to the heirs is a right to proceed against the wrongdoer subject to the defenses available against the deceased, had he lived and prosecuted the suit. The court did not err in submitting this issue to the jury."

The foregoing decision of the Supreme Court of Utah is in full accord with the decisions of this Court in *Northern Pacific* v. *Adams*, *Mellon* v. *Goodyear*, *Kansas City Southern Railway* v. *Van Zant*, and other cases cited in our original brief.

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RAY, QUINNEY & NEBEKER
and
GRANT C. AADNESEN,
Of Counsel.

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Respondent.

BRIEF OF RESPONDENT ON THE MERITS

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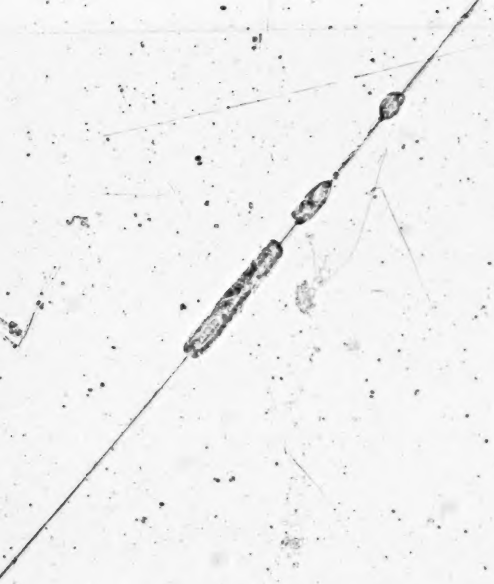

SUPREME COURT OF THE UNITED STATES

No. 400

JACKIE PACKER FRANCIS, a Minor, DENNIS RAY FRANCIS, a Minor, and JAMES BRENT FRANCIS, a Minor, by and Through Their General Guardians, RAY E. FRANCIS and VIRGIL O. PACKER,

Petitioners,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Respondent.

BRIEF OF REPONDENT ON THE MERITS

Because we regard it as important to our case that the court have before it a fuller statement of the facts and because of the importance of a recent decision of the Supreme Court of Utah, we have elected to file this brief upon the merits in behalf of respondent.

STATEMENT OF THE CASE

Petitioners' decedent, at the time of his injury and death, was riding upon a free pass issued to, accepted and used by him upon these written conditions:

"Conditions

"This free pass is not transferable, will be taken up and forfeited if presented or used by a person

not designated on its face, and is subject to revocation at any time without notice. In its use the user assumes all risk of injury to person or property and of loss of property whether by negligence or otherwise, and absolves the issuing company and its officers and employes from any liability therefore. Use hereof in violation of any law is prohibited." (R. 9)

The trial court, following controlling decisions of this court, and in harmony with the law of Utah and the "overwhelming weight of judicial authority,"[1] ruled that the pass conditions constituted a defense against negligence. The case was sent to the jury with instructions that a verdict might be rendered against defendant if defendant were guilty of wilful misconduct causing the injury to and death of decedent. The facts clearly showed that the collision resulting in decedent's death occurred only because respondent's engineer was stricken by a sudden, unexpected and fatal heart attack and not because of any wilful misconduct or inattention. The jury so found and returned its verdict in favor of respondent.

Two weeks before the case was called for trial, counsel for petitioners were furnished with a list of names from which the trial jury was to be drawn. During all of that time they made no objection to or criticism of the panel. When the case was called for trial counsel participated without objection of any kind in the selection of a trial jury. After the persons in the box had been examined as to their qualifications, counsel for petitioners challenged one juror for cause upon the ground that she was the wife of one of respondent's engineers. The trial court allowed that challenge and excused the juror. Counsel then passed the panel for cause and proceeded to exercise their preemptory challenges. They then formally accepted the jury for trial of the case.

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[1]Mellon v. Goodyear, 277 U. S. 335, 344, 72 L. Ed. 906, 910, 48 S. Ct. 541.

A two-day recess was then taken to allow counsel for petitioners time within which to assemble witnesses. A trial was then had. Both sides furnished evidence and argued the case. The jury retired and returned its verdict. Still there was no objection of any kind made by counsel for petitioners to the jury panel. The first complaint came thirty-one days after verdict and judgment. Objection came too late and was without merit.

The case was appealed to and affirmed by the Circuit Court of Appeals for the Tenth Circuit.

In their statement of the case, counsel for petitioners have omitted many important facts of the case. Other facts have been skillfully deemphasized, by reason of which we feel under the necessity of restating the case.

The first and second sections of passenger train No. 21 left Ogden, Utah, westbound 12 minutes apart. (R 69) Both trains were on the way to San Francisco in the state of California. Decedent was enroute from Ogden, in the state of Utah, to Carlin, in the state of Nevada. He was being transported in interstate commerce. (R. 274) That fact is important because it requires solution of this case by reference to Federal statutes and interpretations. It was alleged by respondent, and never denied by the petitioners at any time, that decedent at the time of his injury was not a paying passenger, but was riding the train upon a free pass gratuitously issued by respondent company; that the pass issued free by the company was accepted and used by decedent upon and subject to the conditions quoted above.

The issuance of free transportation for use in interstate commerce is controlled by the Hepburn Act, Interstate Commerce Act as amended, 34 U.S. St. at L. 584, 49 U.S.C.A. 1.

The legal incidents and implications of such transportation are to be determined by federal courts. Decisions of the federal courts in such matters are controlling upon state courts. The trial court ruled that the conditions of the

free pass were such that recovery could not be had for the death of decedent for or on account of negligence, if any, of the respondent, but that recovery could be had only if respondent company were guilty of wilful or wanton misconduct in the operation of its train. The death of decedent occurred when the second section of Train 21 ran into the rear end of the first section. No claim was ever made by petitioners that there was either negligence or wanton or wilful misconduct in the operation of the first section. The theory of the petitioners, never thus far departed from, is that Engineer McDonald, who drove the second section, consciously and knowingly ran his engine and train through two stop signals with a wilful and wanton disregard of the consequences, and that petitioners were therefore entitled to recover as for wilful and wanton misconduct. Any fact, therefore, which throws any light upon the conduct, actions or omissions of McDonald is important and should neither be obscured nor ignored.

McDonald was a veteran engineer of thirty years experience and one long familiar with the railroad and its facilities between Ogden, Utah, and the place of the collision, some twenty-five miles to the west. Out of that long experience he knew that the preservation of his own life and that of his passengers depended upon his obedience to the rules of safety.

He showed up at the enginehouse on the morning involved sometime before starting upon his last and fatal trip. He exchanged greetings with acquaintances and engaged briefly in conversation with Hardman, who was to be his fireman. (R. 83) To persons who saw him on that occasion he appeared to be in good health and spirits. His conversations with Hardman before leaving Ogden and shortly thereafter emphasized his meticulous attention to his steam, oil and water. (R. 83, 91, 92) Upon his departure twenty-four minutes before the collision, he made it plain that everything must be in perfect running order. The steam gauge, the water gauge and the oil must be at exactly the right point to indicate full efficiency and safety. (R. 91, 92) Certainly a man who is about to abandon all

the teachings of a lifetime and drive his engine through one stop signal after another and into a preceding train will not so much concern himself with the details of running efficiency.

Hardman, the fireman, was on his first run with McDonald. He testified that after making the curve near Little Mountain McDonald, in accordance with uniform practice at that point, somewhat reduced his steam throttle and made a slight application of the brakes, which application he assumes was soon released. (R. 90) Hardman testified further that at two different block signals McDonald stated, "I got her," in response to questions concerning the location and aspect of the signals. (R. 86) It was clear and undisputed that neither one of the signals just referred to was the last one before the collision. The last block signal before the collision was No. 7639, next east of it was 7649, then 7659, and so on. (R. 63, Exhibit 1) Hardman showed a lack of acquaintance with the signal numbers and locations even under leading questions. He finally testified, "If I get my signal numbers straight" (R. 86); it was at signals 7659 and 7649 that he said, "I got her." Possibly a jury would be justified in finding that as late as the time he reached 7649 or in that vicinity McDonald was still in possession of his faculties.

Upon approaching signal 7639 Hardman observed that it was red. He called loudly to McDonald but received no response from McDonald, either by voice or movement of any kind. (R. 86, 87) Two thousand feet, or such a matter, further on Hardman saw the red tail lights of the first section. (R 88) Again he shouted to McDonald, and again he received no response whatsoever. (R. 88) Then came the collision, one result of which was to instantly release steam under high pressure and in great volume into the cab where McDonald and Hardman had been sitting. (R. 94, 200, 202, 203) Hardman promptly left the cab of the engine and dropped to the ground, where he walked along the right of way, apparently uninjured. McDonald did not move and had made no effort whatsoever to escape the scalding effects of the steam which poured into his

cab and upon him. (Exhibits 17, 18) As he sat there after the wreck, he and his engine furnished the most eloquent and dramatic evidence that he had not *consciously* run his engine into another train, but that death had closed out his power to function and that it was death and not wilful misconduct, or any misconduct, on the part of McDonald which caused the collision. After the wreck Fireman Hardman walked along the right of way and answered questions put to him with respect to the wreck. But what of McDonald? There he sat in his accustomed seat before the throttle. His chin rested upon his thick chest, his right arm lay upon the window sill by his side, his left hand and forearm hung limply over the throttle quadrant. Before him in easy reach of either hand were the devices by which an engineer in possession of his faculties could control his engine and train—air brakes (both automatic and emergency), steam throttle, reverse lever, a sander, etc. (Exhibit 18, R. 116, 200, 201, 202) All of those instruments were so adjusted and were in such relation, one to the other, as to provide smooth and continued forward motion at a speed of from sixty to sixty-five miles per hour, (R. 201, 202, 204, 205) which was normal speed at that point. The position of all of those instruments and their relation one to the other tell us positively and without contradiction that neither McDonald nor anyone else had made any application of the brakes shortly before the collision. Counsel for petitioners sought by insinuation to raise the inference in the minds of the jury that perhaps someone had tampered with those instruments, and for the purpose of supporting such insinuation he called a witness to the stand. His witness had been at the scene of the wreck from the time it occurred until after 1:00 p.m., some 8 hours later. He testified upon interrogation by petitioner's counsel that no one was seen to go in or about the cab or engine. (R. 106)

The fact that these instruments were so set is important, because it disproves the contention that immediately before the impact the brakes had been heavily applied by the engineer. Petitioners' counsel knew that engineer McDonald died of heart failure and that he was dead when

the impact occurred, but they sought to put life into him immediately before the impact so as to sustain a charge of conscious and wilful misconduct. They relied upon the possibility that they might persuade the court and jury that McDonald consciously made a heavy service application of the brakes within twelve seconds prior to the impact. The condition of the brake controls demonstrates that no such application ever took place and destroys any claim that it did. Never upon the trial did petitioners claim, or even suggest, that McDonald was alive when the impact occurred. The most they ever claimed was that he was alive twelve seconds before and that his heart failure might have been brought on within twelve seconds by consciousness that a collision would shortly occur.

An autopsy was performed upon the body of Engineer McDonald by Colonel Frank Queen, a distinguished pathologist who was then located at the Bushnell General Hospital at Brigham City, a short distance north of Ogden. Dr. Queen was before the court and jury by deposition, and his evidence was unequivocal that the cause of McDonald's death was coronary occlusion, which is a failure of the heart to function by reason of the occlusion of one of the main arteries supplying the heart muscle with necessary blood. (R. 162) He reached that conclusion from a post mortem examination of the arteries of the heart itself. The conclusion that the heart failure occurred, or the prostration and loss of function attendant upon heart failure took possession of McDonald prior to the wreck, is forced upon us by the fact that he made no effort whatsoever to escape the effects of scalding steam. By the autopsy report, which is in the record, and which is undisputed, it is shown that the skin on McDonald's face, chest, arms and hands and upper legs was completely cooked. Post mortem examination demonstrated beyond dispute or controversy that the skin was dead before it was burned. (R. 162, 174, 175) If the skin had been alive when the hot steam came in contact with it, there would have been certain chemical and cellular activity, which was wholly missing in this case. No jury could be per-

mitted to find that McDonald was alive when the escaping steam struck him. His circulation had stopped and he was stone dead. Of this there can be no doubt. It may be said then without contradiction that at the moment of impact McDonald was dead. It is true that upon cross examination Dr. Queen and Dr. Ogilvie both stated that when the scneery is set for the occurrence of coronary occlusion, its onset might be hastened by shock or fright. They both testified that the deceased did not die from shock, but both speaking in the field of speculation and conjecture stated that a coronary occlusion might be hastened by fright.

It is a matter of common knowledge that doctors, in arriving at their conclusions and diagnoses must and often do, rely upon history of preceding events given by the patient, or in the case of the patient's death, by those who observed the patient's conduct. In that manner they determine when pathology first appeared or when symptoms first became apparent by a relation of the patient's conduct to what may be regarded as normal or abnormal. Dr. Ogilvie, knowing that the engineer was dead at the instant of the impact, could not state from an examination of the autopsy report, and Dr. Queen could not state from an examination of the body, what second, minute or hour the coronary occlusion had occurred. But they knew it was a fatal occlusion, and that if it did not kill instantly upon its onset, it was accompanied by devastating and incapacitating pain. (R. 185) When certain facts in the history of McDonald's case were submitted to Dr. Ogilvie he could, by the method commonly followed by physicians, relate the pathological findings to the man's history and formulate an idea by those two factors as to when death occurred. It is given as his opinion that McDonald, being a seasoned and veteran engineer and knowing the rule against running through a red signal, would have responded or reacted to the call of his fireman that the signal was red if he had been in the possession of his faculties. It is without dispute that Fireman Hardman called loudly that signal 7639 was red, and later that the taillights on the

first section of the train were looming ahead, and yet he got no response whatever. There is in the record no substantial evidence that McDonald manipulated the brakes immediately before the impact but on the contrary, all of the evidence on the subject is that he did not. Fireman Hardman, who was in the cab with McDonald saw no application of the brakes and felt no application of the brakes. The brakes themselves show that they had not been applied.

To support the claim of petitioners that the brakes had been applied as claimed, counsel undertook to prove that at some point between signal 7639 and the collision, and not more than twelve seconds removed in point of time from the collision, McDonald made a heavy service application of the brakes in the cab of the engine. They produced three trainmen, the conductor and two brakemen, and one express messenger, all of whom were riding in the last car of Engineer McDonald's train. In their brief, counsel for petitioners rely heavily upon part of the direct testimony of those four witnesses. They call the court's attention to statements made by each of those witnesses upon his direct testimony, but fail to disclose that upon cross examination each and every one of these witnesses took back any word of testimony which might be construed as support for the contention of petitioners. Such testimony as came from those witnesses on direct examination, coming as it did from men twenty cars back at the end of the train, might seem thin at best. But the three trainmen, when subject to cross examination, clearly and unequivocally stated that what they had once testified was a service application of the brakes might just as well has been an emergency application caused by the collision of the two trains. A fair construction of their testimony is that, not only did they finally agree that the application of the brakes might as well have been an emergency application caused by the collision, but that it *was* such an application. The express messenger who had no expert knowledge of such matters, when subjected to cross examination, not only admitted that what he had testified to as a service application of the brakes might have been an emergency application, but

his testimony, as pointed out hereafter, furnishes positive evidence that such application was in truth the emergency application caused by the collision itself.

The four witnesses just referred to are Conductor Welch, Brakemen Russell and Altman and express messenger Cook. All four of those men were riding in the twentieth car, which was the last car in McDonald's train. The conductor and brakemen were experienced railroaders and knew something of air brakes and their powers and incidents. The express messenger was inexperienced in such matters and knew nothing of them. Before the trial of this case all of the men just mentioned were sworn and testified at an Interstate Commerce Commission investigation, and later at an inquest conducted by local authorities at Ogden, Utah.

At those hearings they gave testimony that prior to the collision they felt a heavy application of the brakes and gave it as their opinion at some points in those hearings that the application occurred thirty to fourty-five seconds before the impact. It was at first their opinion that the brake application was a "service application," which could have been accomplished only by manipulation of the air valves by the engineer. During the inquest Conductor Welch and Brakemen Altman and Russell made an experiment after which they revised their estimate of time and concluded that the brake application was felt some twelve seconds before the collision. (R. 107, 110, 119). Having thus revised their judgment of time, those witnesses, before closing their testimony at the inquest, abandoned their belief that there had been a heavy *service* application of the brakes and confessed that they could express no opinion as to whether what they first thought was a service application of the brakes was in fact a service application or an emergency application, caused not by manipulation of the engineer, but by the collision itself. (R. 103, 112, 120)

The court will bear in mind that the engine and train involved in this case was equipped with air brakes. The

braking system consisted of automatic and emergency brakes. The automatic brake was one by which the engineer made the ordinary stops from time to time. Such stops are called service stops. In the making of such stops the engineer makes service applications of the brakes. Such applications are made by the release of compressed air in such amounts as to bring the train to a stop. They are gradual and light or heavy as the case may require. A service application can be made only by the engineer. (R. 69, 76)

The emergency brake is applied by release at once of all the air in the trainline. When this occurs brakes are set immediately upon all the wheels on the entire train, from the engine to the very last car. An emergency application may be accomplished by the engineer from his seat in the cab. Such an application is made automatically and instantaneously whenever there is a break in the trainline at any point in the train and independently of any action by the engineer. For instance, there is an anglecock on the very front of the locomotive. If that is broken off and the air is permitted to escape, the emergency brakes are set at once throughout the entire train. (R. 98) Likewise, anything which breaks the airline at any place in the train puts the entire train in emergency. A separation of the cars at any point or any other accident which separates the airline will set all the brakes in emergency.

The witness Ware, who was engineer of the first section, testified in behalf of the petitioners that the instant the rear of his train was struck the airline was broken and his entire train was in emergency. Likewise, the collision damaged the front of McDonald's engine and his train was broken apart in many places. Whichever break occurred first in the McDonald train set the brakes in emergency in the entire train, including the last car in which the conductor and the brakemen were sitting. (R. 76, 99) All of this is entirely without dispute in the record.

It is likewise without dispute in the record that after McDonald's engine struck the rear of the first section the

last car in his train—the one in which the conductor and brakemen were riding—moved forward on the rails a distance of 500 feet before coming to a stop. (R. 100, 122) If that car was moving at a speed of sixty miles per hour when the collision occurred, then its speed was reduced from sixty miles an hour to nothing in 500 feet. It may be fairly said then, that during that last 500 feet of its movement the average speed of the car was thirty miles per hour. At that speed the car would move forty-five feet per second. It would require then, slightly over eleven seconds from the time of the collision until the car stopped. During that interval cars near the front of the train were being buckled and tossed out of the train and off the track. (Exhibits 10, 15, R. 122) Those occurrences doubtless accounted for the erratic forward movement of the last car with accompanying lurches. (R. 98, 105)

With that explanation, we now turn to the conductor, the brakemen and the express messenger who were called by petitioners' counsel and by whose testimony petitioners are bound. Just as some of those witnesses first testified at the I. C. C. hearing and at the inquest that they felt a heavy service application of the brakes a few seconds before the impact, so in the trial court below they first testified, upon direct examination only, that such an application had been made. If those witnesses had not been subjected to cross examination the record would now be what counsel would have this court believe it is. But the decisions of the Supreme Court of Utah and the law generally is that the testimony of a witness is no stronger than it is left upon cross examination. See *Putnam v. Industrial Commission, et al*, 80 Utah 187, 14 P. (2d) 973; *Davis v. F. W. Woolworth Co.*, 60 F. (2d) 344 (C.C.A. 10th). Witness the record upon this point. Upon cross examination of Brakeman Russell, this was his testimony:

> "A. There were 20 cars in our train and after the collision some of them were crisscrossed over the track; some of them came out of the train and were thrown off the track and in each case where that occurred there was a break in the train. As

the cars left the train and crisscrossed, that shortened the train up.

Q. And the buckling out of the train of a car from time to time could well account for those lurches you described, couldn't it?

A. Possibly.

Q. Did you account for it in that way?

A. I don't know.

Q. But there were three separate lurches?

A. Distinct shocks, yes, sir.

Q. And they could have occurred by the buckling out of the train of certain cars?

A. Yes, sir." * * * (R. 98)

Q. There is an anglecock on the front of the engine, isn't there?

A. Yes, sir.

Q. So if it should happen to hook up with another engine you could connect up the air between them?

A. Yes, sir.

Q. And if you break that anglecock you set the air in the whole train, don't you?

A. Immediately, yes, sir.

Q. What?

A. Immediately, yes, sir.

Q. So just the instant you break the anglecock off the front of that engine, the air went back to the rear car you were in faster than your train was moving, didn't it?

A. I don't know.

Q. Don't you know as an engineer—as a railroad man—that it does?

A. I don't know.

Q. You have no opinion?

A. No, sir.

Q. What is your judgment as to whether the air moves back from that engine to the 20th car at a speed faster than 40 miles an hour?

A. It is possible, yes, sir.

Q. Don't you think it does?

A. I think so.

Q. So just the minute that anglecock cracked, that train in front—or the air went on the end of your car, didn't it?

A. I don't know.

Q. Do you think it did or didn't?

A. I don't know.

Q. What would you expect when you break the trainline, whether the air would go back into your car or not?

A. If the train line is broken the brakes apply immediately.

Mr. Ray: Isn't any question about it. One other question:

Q. The car you were in was the last car, wasn't it?

A. Yes, sir.

Q. And it stayed on the track?

A. Yes, sir.

Q. So that it was subject to emergency application of the brakes, wasn't it?

A. Yes, sir.

Q. And it did go into emergency, didn't it?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. Did you hear engineer Ware say that it has to go into emergency once the air line is broken?

A. If it is broken, yes, sir.

Q. That is true, isn't it?

A. Yes, sir.

Q. There is no doubt your train was broken, is there? You have testified you saw cars criss-crossed over the tracks, haven't you?

A. Yes, sir.

Q. So you do know the emergency went back into your car, don't you?

A. Yes, sir.

Q. Now, you also know, do you not Mr. Russell, that your car moved five or six hundred feet after the first impact?

A. Yes, sir. * * *" (R. 98, 100)

"Q. Now, you have no doubt that the emergency set in your car, do you?

A. I didn't feel the emergency application.

Q. As you sit there right now you have no doubt it did, do you?

A. There is no doubt.

Q. You have no doubt that the emergency would be set in your car if the anglecock was knocked off the front of your locomotive by the collision, have you?

A. As soon as the train line was broken." • • • (R. 101-102)

"A. I appeared at the inquest held in Ogden on the 16th day of January, 1944, and gave testimony. There were 9 cars derailed out of the train, with 11 cars standing upright.

Q. I want to read a part of the testimony you there gave; see if I read it correctly. Were you asked this question: 'Mr. Russell, you have a good many years as a brakeman and conductor, and you know the application of brakes, do you not?' And you answered: 'Approximately.'

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. 'And from your experience of having it applied at various times and conditions?' Your answer was: 'Yes, sir.'

A. Yes, sir.

Q. Then this question: 'This heavy application you referred to, was that in your opinion,—and this leads to the question one of the jurors asked,—was that, in your opinion, the application of the brakes by some one, or could it have happened by the impact?' Do you remember that question?

A. Yes, sir.

Q. And your answer: 'I cannot say.' Do you remember giving that answer?

A. Yes, sir.

Q. And then the next question: 'You do not know?' And your answer: 'No, sir.' You gave those answers at the inquest?

A. As I remember, yes, sir.

It is my position now that I am unable to say whether or not the applictaion of brakes which I felt resulted from someone applying them or from the impact itself." (R. 103)

Upon recross examination Brakeman Russell testified:

"I don't know whether the cars that were pinched out of the train went out all at once or at intervals. If they went out one or two at a time over a very brief period, that would check the movement of the train, would probably cause it to lurch." (R. 105)

This took place upon the cross examination of Brakeman Altman:

"A. I testified at the Interstate Commerce Commission hearing on January 6, 1945, and 10 days later I appeared and gave testimony at the inquest and I was sworn in both instances. My first impression was that there was a lapse of time between the application of the brakes and this shock or lurch, which I referred to of 30 to 35 seconds. I later witnessed an experiment and revised my idea of the time which elapsed to approximately 12 seconds.

Q. Now, at the time you testified on January 6th and again on January 16th, it never had occurred to you that there was any emergency application of the brakes in that car had it?

A. No, I couldn't tell whether it was; as far as I know there was no emergency application.

Q. It had not occurred to you, had it?

A. No.

Q. But you know now when you think of it and you know your train was broken in two, you know there was, don't you?

A. Well, there would have to be to break the train line.

Q. You know there was now as you sit here and think about it in that light, don't you?

A. Well, I don't know for sure.

Q. Well, you found your air was working all right when you left Ogden?

A. Yes.

Q. And you know when the trainline breaks any place you just cannot help setting the emergency brakes, don't you?

A. That is right.

Q. So don't you have to conclude now, Mr. Altman, that there was emergency application on that car?

A. Well, that is the ultimate result, yes, sir.

Q. So you agree with us on that?

A. Yes, sir." * * * (R. 110-111)

"A. I recall my testimony given at the inquest.

Q. Do you remember this question being asked to you: 'Was it the type of application that might have been caused by the impact?' Do you remember that question?

A. I don't recall it now.

Q. Would you say that was or was not put to you?

A. Yes, I imagine it was.

Q. And your answer: 'I wouldn't be able to say as to that, it is possible.' Do you remember that?

A. Yes, sir.

Q. And then the question: 'Have you formed any independent opinion on that point?' And your answer: 'No, I wouldn't pass an opinion on it.' Do you remember that?

A. That is right.

Q. And is that still correct?

A. Yes, sir.

Q. This application of the brakes that you felt may or may not have been caused by the impact?

A. That is right. I have no way of knowing." (R. 112)

And this occurred upon the cross examination of Conductor Welch:

"Q. Mr. Welch, you have appeared at both the Interstate Commerce Commission hearing and the inquest, did you not?

A. Yes, sir.

Q. Would you now state—having thought about the matter and having heard the testimony given here today—Mr. Welch would you now state it must have been an emergency application of the brakes on your car?"

A. Prior to that wreck, I didn't know what an emergency application was like on a passenger train. Since that time I have had two or three occasions to witness an emergency stop and there was very little difference in the action from these emergency stops that have been made recently with me on a passenger train and that one there; they both had the same effect. I might add this: there is a difference between an emergency stop—the effects of an emergency stop—on a passenger train and on a freight train.

At the time of the application I was busy with my book work. My attention was focused upon what I was doing and my attention was first distracted by the application of the brakes. Since that time I have had experience with emergency stops on passenger trains.

Q. Now, from that experience are you now able to say that the applications of the brakes you felt on this occasion were substantially the same as those emergency applications you felt since then?

A. That is right.

Q. Your answer is yes?

A. Yes, sir.

Q. And you also know from your long experience in train service that by reason of the breaking of your train it was inevitable that the emergency brake would set on your car?

A. Well, any time a trainline is broken on a train, on any part of the train from the engine to the rear end, will cause an emergency action.

Q. Now, so then I take it, Mr. Welch, that the application of the brakes which you felt on this occasion may very well have been caused by the impact?

A. 'As far as I know.'' • • • (R. 120)

(Question read as follows:) "Now, if there was only one application of air in view of the fact that this train line was broken all to pieces, that one single application must have been an emergency, must it not, Mr. Welch?

A. Yes.'' • • • (R. 125)

"Q. But you felt only one application of the brakes?

A. Yes.

Q. And there being only one you are satisfied now that was an emergency application, isn't that correct?

A. I think so." (R. 126)

In *Putnam v. Industrial Commission, et al*, supra, the Utah Supreme Court said:

"• • • the familiar rule is applicable that testimony of a witness on his direct examination is no stronger than as modified or left by his further examination or by his cross-examination."

This leaves us of the four witnesses in the rear car, express messenger Cook. By the time the railroad witnesses had concluded their testimony it was agreed by all of them—by all of the witnesses qualified by knowledge and experience to know and understand the subject—that there must have been an emergency application of brakes set by the breaking of the train, and inasmuch as there was only one application of the brakes, it must have been an emergency application caused by the impact. Such is the effect of the testimony of the railroad men, and such is the mute testimony of the brake valves which were in position for continued normal speed forward at the time of the impact.

This being true, the testimony of Cook that there was a service application of brakes has no probative force or substance. He showed no qualifications to determine whether an application of brakes was service or emergency. Furthermore, by another part of his testimony, Cook made it plain that what he first thought was a service application of brakes was really the collision. He was doing book work and when startled by the heavy jar he looked out the window and saw a flare going by. (R. 129, 130) The flare he saw was three car lengths, or approximately 150 feet behind his car when the car stopped. (R. 97, 109, 119) His car moved 500 feet after the collision. It is demonstrated then that when the flare was even with Cook's window, Cook's car had already moved 350 feet after the

collision. The testimony of Welch, Russell, Altman and Cook constitutes no evidence whatever that McDonald consciously applied the brakes as claimed by petitioners' counsel. The testimony respecting the position of the brakes in the engine cab, the condition of McDonald's heart and skin, and his position on the seat after the wreck, and the testimony of Hardman that McDonald failed to be aroused by his loud calling, leaves it without any substantial dispute that before reaching signal 7639 McDonald was the victim of a heart attack and unable to control his train.

If it be assumed that McDonald was conscious and in possession of his faculties when he reached block signal 7649 and that such signal was red, was McDonald guilty of negligence or wanton and wilful misconduct for passing it? The record makes it plain that he was not. The correctness of this view is illustrated by the conduct of Engineer Ware, who drove the engine pulling the first section of Train 21. The court will remember from the record that the block signals involved in this case operated on the overlapping method. (R. 65) That means that a train on the track, a broken rail, or whatever activates the signal activates two signals to the rear. So here the first section which stood between signals 7629 and 7639 activated signals 7639 and 7649 to the east. When Engineer Ware westbound approached signal 7649, the freight train No. 581 stood between signals 7629 and 7639. Signal 7649 was, therefore, red, but Ware did not and perhaps could not stop short of the signal. (R. 73, 75) Upon seeing it in stop position and displaying red, he reduced speed and came to a stop half-way between 7649 and 7639. He then moved ahead cautiously until he had passed 7639 and was near the rear of the freight train. (R. 75) No claim was ever made that Ware was negligent. The first red signal informs the engineer that danger is ahead at least one full block. It was not negligent to pass 7649, but the rules required McDonald to stop in that block as Ware had done. The only fair inference is that McDonald, like Ware, could not have seen the position of signal 7649 until

he was very near to it and much too close to stop before passing it. When McDonald reached 7649, he may have still been in possession of his faculties. He was then one and one-half minutes in time and one and one-half miles in distance from the point of collision. Fifty to sixty seconds later the red light of 7639 and the shouts of Fireman Hardman failed to arouse him from his oblivion. Ninety seconds later he was sitting dead in his cab, allowing the steam to scald his dead face and chest. That departure from the normal habits and training of a lifetime, taken in connection with the condition of his heart, as shown upon post mortem examination, led to the scientific conclusion by Dr. Ogilvie that a heart seizure had prevented normal reaction as McDonald approached signal 7649. A finding that McDonald *consciously* failed to stop short of 7639 would be without support of any substantial or probative evidence.

No claim was made that Fireman Hardman was guilty of negligence, much less wanton or wilful misconduct. When he first became aware of impending danger he endeavored, without success, to arouse the engineer. He then busied himself putting out his fire and controlling the fuel oil. (R. 88) Counsel for petitioners called as their witness Louis E. Campbell, who was fireman on the first section of 21, and qualified him as an expert. He testified that under conditions of an emergency a fireman should do as Fireman Hardman did. (R. 81, 82) By that testimony petitioners are bound. Upon all of the testimony respondent company asked the court for an order directing the verdict, no cause of action. The motion was made in all sincerity and good faith; we thought it should have been granted and we are of the same opinion still. No one in the exercise of a calm judgment could ever conclude that McDonald was in possession of his faculties at a time when otherwise he would have been stopping his train, and any such finding would be without substantial support in the record and would necessarily be based upon emotional consideration. Not only is there no substantial evidence in the record that McDonald was guilty of wilful or wanton mis-

conduct, there is no substantial evidence in the record that he was guilty of negligence of any degree. Likewise, there is no evidence in the record that Hardman was guilty of any negligence. Upon the whole record it is plain that the collision resulted, not from the negligence or wilful misconduct of either engineer or fireman, but from the wholly fortuitous intervention of a heart attack. Apparently from the post mortem examination the stage was set for McDonald to receive a heart attack. There is no evidence that he knew or that anyone else knew of such a setting or that such a setting could have been discovered. The attack might have overtaken him as he sat at his meal, as he read his morning paper, or as he rested in his bed at night. Fate willed that the attack should come while he was at the throttle of his engine and for that neither he nor the respondent can be charged with wilful or wanton misconduct or negligence of any grade.

ARGUMENT

Pass Binding Upon Petitioners

Throughout all of these proceedings counsel have admitted that if decedent had survived and had brought suit against respondent for his injuries, the conditions of the free pass, to which he had agreed by the use of the pass, would have been a good defense against a claim of negligence. But they assert that the heirs have a new cause of action which came into existence only upon the death of decedent. Wherefore, they claim the conditions of the pass are in no sense binding upon the heirs. On page 33 of their brief in this court, counsel assert that petitioners' right to recovery cannot be "abrogated by any contract, agreement, settlement, release or any other conduct of decedent during his lifetime, either before or after suffering the injuries causing death." This seems to mean that if decedent had survived for a time and had settled his case and released the company, still the heirs would be free to make recovery for decedent's death. Likewise, it means that no matter what the conduct of the decedent may have been during his lifetime, the heirs would in this lawsuit

have a cause of action wholly unimpaired by such conduct. That is the fundamental contention of petitioners before this court. Such contention is squarely in conflict with numerous controlling decisions of this court. It is likewise directly in conflict with the law as announced by the Supreme Court of the State of Utah; and it is against the overwhelming weight of other judicial authority.

Decisions of This Court

That the conditions of the free pass involved in this case are binding upon petitioners, is settled by a line of decisions of this court, beginning with *Northern Pacific v. Adams*, 192 U. S. 440, 48 L. Ed. 513, 24 S. Ct. 408, and covering a period of approximately thirty years without departure or modification.

The leading and controlling case upon the subject is *Northern Pacific Ry. Co. v. Adams*, supra. Adams was riding upon a free pass in interstate commerce when killed. His heirs brought suit under a death statute of Idaho substantially identical to the Utah statute. The pass was set up as a defense. Plaintiffs asserted the pass was no defense against them, inasmuch as they had a right of action separate and distinct from the one which would have been enjoyed in his lifetime by decedent if he had suffered injury instead of death. In connection with this point this court said:

> "A statute of Idaho reads as follows:
>
> "'When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or, if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as, under all the circumstances of the case, may be just.' Idaho Rev. Stat. § 4100."

"As the negligence of the company, found by the jury to have caused the death, as well as the resulting death, took place in Idaho, the plaintiffs' right of action rests on the statute of that state. What is the scope and meaning of that statute? The circuit court charged the jury:

"'You are not to consider what was the duty of this carrier toward Mr. Adams, who was killed, but the duty which the defendant owed to these plaintiffs; and the duty which they have the right to exact from the defendant in this case is the same duty which the defendant company owed to the public in general.'

"In other words, although it should appear that the company in no respect failed in its duty to the deceased, it could yet be held responsible to the widow and son for the damages they suffered by reason of the death. But that is a misconception. Their right of action arises only when his death is caused by 'the wrongful act or neglect.' If there be no ommission of duty to the decedent, his heirs have no claim. Suppose an individual is wantonly assailed, and, in order to protect his own life, is obliged to kill the assailant—may the heirs of the decedent have that act of taking life, rightful as against the decedent, adjudged wrongful as against them, and recover damages from one who did only that which his duty to himself and family required him to do? The statute does not provide that when one's life is taken by another the heirs of the former may recover damages, but only when it is wrongfully taken,—that is, when it is taken in violation of the rights of the decedent; wrongful as against him. 'Neglect' stands in the same category with 'wrongful act.' It implies some omission of duty."

"The two terms, therefore,—wrongful act and neglect,—imply alike the omission of some duty, and that duty must, as stated, be a duty owing to

the decedent. It cannot be that, if the death was caused by a rightful act, or an unintentional act, with no omission of duty owing to the decedent, it can be considered wrongful or negligent at the suit of the heirs of the decedent. They claim under him, and they can recover only in case he could have recovered damages had he not been killed, but only injured. The company is not under two different measures of obligation,—one to the passenger and another to his heirs. If it discharges its full obligation to the passenger, his heirs have no right to compel it to pay damages.

"Did the company omit any duty which they owed to the decedent? He was riding on a pass which provided that the company should 'not be liable, under any circumstances whether of negligence of agents or otherwise, for any injury to the person.' He was a free passenger, paying nothing for the privilege given him of riding in the coaches of the defendant. He entered those coaches as a licensee, upon conditions which he, with full knowledge, accepted. He was not a passenger for hire, such as was held to be the condition of the parties recovering in *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, and *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535. * * *"

The *Adams* case has never been overruled or modified by this court, but has been followed in *Michigan Central Railroad v. Vreeland*, 277 U.S. 59, 57 L. Ed. 417; *Kansas City Southern v. Van Zant*, 260 U.S. 459, 67 L. Ed. 348; and *Flynn v. N. Y. N. H. & H. Railroad*, 283 U.S. 53, 75 L. Ed. 837.

In the *Vreeland* case this court considered the matter at length and concluded that the cause of action given to the heirs is entirely distinct from the one held in his lifetime by the deceased, but unequivocally declared the rule for which we contend in this language:

"But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury. Tiffany, Death by Wrongful Act, Sec. 124; *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U.S. 231, 38 L. Ed. 422, 14 Sup. Ct. Rep. 579; *Read v. Great Eastern R. Co.*, L. R. 3 Q.B. 555, 9 Best & S. 714, L. J. Q. B. N. S. 278, 18 L. T. N. S. 82, 16 Week. Rep. 1040; *Hecht v. Ohio & M. R. Co.*, 132 Ind. 507, 32 N. E. 302; *Fowlkes v. Nashville & D. R. Co.*, 9 Heisk. 829; *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271; *Southern Bell Telph. & Teleg. Co. v. Cassin*, 111 Ga. 575, 50 L.R.A. 694, 36 S. E. 881."

In *Mellon v. Goodyear*, 277 U.S. 335, 72 L. Ed. 906 (Reversing 121 Kan. 392, 247 P. 446), this court had before it the question whether a settlement by an employee in his lifetime barred an action after his death by his heirs for his death. This court reviewed the authority upon the subject at great length and followed the rule announced in the *Vreeland* case. In the course of its opinion upon the subject this court said:

"Concerning that section, Vreeland's Case, supra, declares: 'But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.' And no later opinion here has given expression to any other view.

"By the overwhelming weight of judicial authority, where a statute of the nature of Lord Campbell's Act in effect gives a right to recover damages for the benefit of dependents, the remedy depends upon the existence in the decedent at the

time of his death of a right of action to recover for such injury. A settlement by the wrongdoer with the injured person, in the absence of fraud or mistake, precludes any remedy by the personal representative based upon the same wrongful act. Construing the statute of Kansas, the Supreme Court of that state seems to have accepted this generally approved doctrine. *Fuller v. Atchison, T. & S. F. R. Co.*, 124 Kan. 66, 257 Pac. 971.

"The cases supporting this view, from courts of last resort in twenty-one states, Canada and England, are collected in a note following the first opinion of the supreme court of Kansas in the present cause, reported in 39 A.L.R. 579. And in Tiffany on Death by Wrongful Act, 2d Ed. Sec. 124, the rule (with supporting authorities) is thus broadly stated—

"'If the deceased, in his lifetime, has done anything that would operate as a bar to a recovery by him of damages for the peronal injury, this will operate equally as a bar in an action by his personal representatives for his death. * * *'"

Subsequently this court reaffirmed the rule in *Flynn v. New York, N. H. & H. R. Co.*, 283 U.S. 53, 75 L. Ed. 837, saying:

"Obviously Flynn's right of action was barred, but it is argued that the right on behalf of the widow and children is distinct; that their cause of action could not arise until Flynn's death, and that therefore the two years did not begin to run until September 1, 1928. But the argument comes too late. It is established that the present right, although not strictly representative, is derivative and dependent upon the continuance of a right in the injured employee at the time of his death. *Michigan C. R. Co. v. Vreeland*, 227 U.S. 59, 70, 57 L. Ed. 417, 421, 33 S. Ct. 192, Ann. Cas. 1914C, 176. On this ground an

effective release by the employee makes it impossible for his administrator to recover. *Mellon v. Goodyear*, 277 U.S. 335, 344, 72 L. Ed. 906, 910, 48 S. Ct. 541. The running of the two years from the time when his cause of action accrued extinguishes it as effectively as a release, *Engel v. Davenport*, 271 U.S. 33, 38, 70 L. Ed. 813, 817, 46 S. Ct. 410, and the same consequence follows. Our conclusion that this action could not be brought is required by the former decisions of this court."

To the same effect is *Frese v. C. B. & Q. Railway*, 263 U.S. 1, 68 L. Ed. 131. We particularly invite this court's attention to its language in *Charleston and Western Carolina Ry. Co. v. Thompson*, 234 U.S. 576, 58 L. Ed. 1476:

> "As the pass was free under the statute, there is no question of the validity of its stipulation. This was conceded by the Court of Appeals, as we have stated, and is established by decisions of this court. *Northern Pacific Railway Company v. Adams*, 192 U.S. 440, 48 L. Ed. 513, 24 Sup. Ct. Rep. 408; *Boering v. Chesapeake Beach R. Co.*, 193 U.S. 442, 48 L. Ed. 742, 24 Sup. Ct. Rep. 515."

That the pass here involved was a free pass and that it was issued under the Hepburn Act has never been challenged. In this connection, permit us to remind the court that the fact that such pass was accepted and used in interstate commerce gives controlling effect to Federal decisions upon the point now under discussion.

The leading case upon this point is *Kansas City Southern Railway Company v. Van Zant*, 260 U.S. 459, 67 L. Ed. 348. That case involved the effect of a condition in a free pass issued by a railway company for interstate commerce. Van Zant suffered injuries in Missouri while using the pass in interstate commerce. The pass carried substantially the same conditions as those involved in this case, and the company averred that the conditions constituted a defense against the charge of negligence. The

respondent replied that she received the pass as a resident of Kansas and that she was injured in Missouri and that in both those states such a limitation upon liability was unlawful as against public policy. This court ruled that the laws of Kansas and Missouri were without effect and in the course of its opinion sustaining the rule for which we contend stated:

> "The provision for passes, with its sanction in penalties, is a regulation of interstate commerce to the completion of which the determination of the effect of the passes is necessary. We think, therefore, free passes in their entirety are taken charge of,—not only their permission and use, but the limitations and conditions upon their use. Or, to put it another way, and to specialize, the relation of their users to the railroad which issued them, the fact and measure of responsbility the railroad incurs by their issue, and the extent of the right the person to whom issued acquires, are taken charge of. And that responsibility and those rights, this court has decided, the railroad company can control by conditions in the passes. Antecedently to the passage of the Hepburn Act, we decided that a passenger who accepts a free pass may exempt a carrier from responsibility for negligence, and no public policy is violated thereby. *Northern P. R. Co. v. Adams,* 192 U.S. 440, 48 L. Ed. 513, 24 Sup. Ct. Rep. 408; *Boering v. Chesapeake Beach R. Co.,* 193 U.S. 442, 48 L. Ed. 742, 24 Sup. Ct. Rep. 515.
>
> "Those cases were considered and applied as giving validity to the stipulation of passes issued under the act in *Charleston & W. C. R. Co. v. Thompson,* 234 U.S. 576, 58 L. Ed. 1476, 34 Sup. Ct. Rep. 964, according thereby freedom of transportation to the possessor of a pass, and giving assurance to the railroad company that its gratuity will not be given the consequences of compensated right

* * *"

To the same effect as the foregoing are *Northern Pacific Company v. Adams*, supra; *Boering v. Chesapeake Beach Railway Company*, 193 U.S. 442, 48 L. Ed. 742; *Charleston and Western Carolina Railway Company v. Thompson*, supra.

In further support of the rule that Federal decisions control in the interpretation of the issuance and use of passes for interstate commerce we cite *Bush v. Bremner*, 36 F. (2d) 189, (C.C.A. 8th); *Williamson v. Seaboard Air Line Railway*, 118 S.E. 255, (Va.) (Cert. den. 263 U.S. 710, 68 L. Ed. 518); *Ellis v. Davis*, 4 F. (2d) 323 (C.C.A. 5th); *Louisville and Nashville Railway Company v. George*, 129 S.W. (2d) 986; *Bowman v. Pennsylvania Railway Company*, 149 Atl. 877 (Pa.); *Dunn v. Alton*, 88 S.W. (2d) 224, (Missouri); *Wright v. Central of Georgia*, 89 S.E. 457, (Ga.); *Pinnell v. S. L. & S. F. Railway Company*, 263 S.W. 182 (Missouri); *Muldoon v. Seattle City R. Co.*, 38 P. 995.

The California courts have at times followed the minority view that survivors may have an action when the injured person would have had no such right. But the Supreme Court of California clearly agrees with us that in cases involving passes, like the one now under review, the Federal decisions control and state decisions are of no force or effect. See *Donnelly v. Southern Pacific Company*, 118 P. (2d) 465, where the California Supreme Court says:

> "If congress enacts a statute that embraces the general field but does not cover the matter on which the state has ruled, the state statute or decision is superseded only if congress intended by such legislation to occupy the entire field, thereby excluding all state control, (citing many cases)
>
> "* * * The state courts are then bound by federal decisional law in the field * * *. In 1906 congress passed the Hepburn Act, 34 U.S. Stat. at Large 584, 49 U.S.C.A. 1 et seq. regulating the issuance of free passes by interstate commerce * * *

the Supreme Court of the United States took the position in *Kansas City Southern Ry. Co. v. Van Zant*, 260 U.S. 459, 43 S. Ct. 176, 67 L. Ed. 348, that the Hepburn Act was intended to occupy the entire field of free passes, that it superseded all state law in the field, and that the decisions of the federal courts were therefore controlling on the liability of a carrier for negligence to a holder of a pass containing an exculpatory provision. This court is bound by that decision and must therefore disregard the California law and apply the rules established by the decisions of the federal courts.

"The United States Supreme Court has made it clear that a carrier may validly contract to release itself from liability for negligence to the holder of a free pass. *Northern Pacific Ry. Co. v. Adams*, 192 U.S. 440, 24 S. Ct. 408, 48 L. Ed. 513; *Boering v. Chesapeake Beach R. Co.*, 193 U.S. 442, 24 S. Ct. 515, 48 L. Ed. 742; *Charleston & Western Carolina Ry. Co. v. Thompson*, 234 U.S. 576, 34 S. Ct. 964, 58 L. Ed. 1476; *Kansas City Southern Ry. Co. v. Van Zant*, supra.

"Plaintiff contends that while the release is effective as to ordinary negligence, it is not effective as to gross negligence. The federal courts, however, have rejected any distinction between negligence and gross negligence; they recognize no degree of negligence. *New York Central Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; the *New World v. King*, 16 How. 469, 14 L. Ed. 1019; *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U.S. 489, 494, 23 L. Ed. 374; *Westre v. Chicago, M. & St. Paul Ry. Co.*, 8 Cir., 2 F. 2d 227, and cases there cited."

Utah Decisions

Petitioners' contention that no conduct of the decedent during his lifetime could affect the cause of action of the heirs is in direct conflict with the very latest decision of the Supreme Court of Utah upon the subject. *Van Wag-*

oner v. Union Pacific R. Co., 186 P. (2d) 293, (Pacific advance sheet December 12, 1947), was decided on November 4, 1947, after petitioners and respondent had both filed their original briefs in this case. In its decision in that case the Utah court reminds us that the wrongful death statute of the state affords a cause of action for wrongful death and that "wrongful is used in the sense of wrongful as against the decedent." In that case it appears that Van Wagoner was killed at a grade crossing by a Union Pacific engine. His heirs brought suit under the Utah wrongful death act to recover damages. The railroad pleaded contributory negligence of Van Wagoner as one of its defenses. Plaintiffs there, just as petitioners do here, contended that they had a new cause of action which came into being only upon Van Wagoner's death, and that such cause of action could not be in any way impaired by any conduct of Van Wagoner in his lifetime. Wherefore, they contended that Van Wagoner's contributory negligence was immaterial and could not be properly shown in defense. And plaintiffs there, just as do petitioners here, relied upon *Halling v. Industrial Commission of Utah*, 71 Utah 112, 263 Pac. 78, and *Mason v. Union Pacific Railroad Company*, 7 Utah 77, 24 Pac. 796. Plaintiffs' contentions in the Van Wagoner case were rejected by the Supreme Court of Utah. The Utah court held that if the conduct of decedent in his lifetime was such as to constitute contributory negligence, such conduct then was a bar to recovery by the heirs under the wrongful death act of Utah. We quote the following from the Utah decision:

> "Appellants by appropriate assignment raise the question as to whether or not under the statutory right of recovery for death the defense of contributory negligence of the deceased can be rightly submitted to the jury. Admittedly, this has been the practice in the courts of this state for many years, and there is no compelling reason for this court to overturn a precedent so well established and so firmly entrenched. If a departure from well-recognized principles of law is to be accom-

plished it should be by legislative action and not by judicial determination.

"In the case of Helfrich v. Ogden City Ry Co., 7 Utah 186, 188, 26 P. 295, 296, the principal issue on appeal was the defense of contributory negligence of the deceased. The court held the personal representative could not recover because of the negligence of the deceased in putting his head out of the cab. The following quote establishes the law as announced by this court: '* * * We think it was negligence in the company in maintaining and operating its road so near the line of telegraph poles; but this case turns upon the question as to whether the carelessness of the deceased caused his death. If he was negligent, and did not use due care, reasonable in the situation, and his want of such care contributed to his injury, the plaintiff cannot recover. This doctrine is so well known and understood that no authority need be cited in its support; but we cite Quibell v. Union Pac. Railway Co., (post, 7 Utah 122,) 25 P. 734 (decided at this term of this court). * * * In this case the carelessness of the decedent clearly was the proximate cause of his death, and the jury ought to have found for the defendant. * * *'

"Appellants rely on the cases of Mason v. Union Pac. R. R. Co., 7 Utah 77, 24 P. 796 and Halling v. Industrial Commission, 71 Utah 112, 263 P. 78, which, in substance, holds that a claim for death is a separate and independent cause of action and is not a continuation of the right of action of the injured party for personal injuries. The death creates a new cause of action for the loss suffered by the heirs by reason of death, and only comes into existence upon the happening of death.

"If we follow the reasoning of these two last-cited cases, the conclusion is inevitable that they do not overrule the decision in the Helfrich case. For

> the purpose of clarifying the statement, assume that the deceased had only been injured in this collision. The right of action would run in his favor, and the defense of contributory negligence would have been properly submitted. The right of action running to the appellants in this case is founded on the same unlawful acts of the defendant, but the loss and damages suffered by them arise out of the death of the deceased. The legislature has thus said the right of action vests in the heirs-at-law if death ensues, but it does not say the rights of the third parties are modified, altered, or changed. On the contrary, it bases recovery on the wrongful death by another and wrongful is used in the sense of wrongful as against the deceased, and does not include those situations where the deceased either solely or proximately contributes negligently to his own death. This court is of the opinion the legislature did not intend to change the rules of substantive law and deny to litigants the right to defend on the ground of contributory negligence. For the purposes of this suit, all that Section 104-3-11, U.C.A. 1943, grants to the heirs is a right to proceed against the wrongdoer subject to the defenses available against the deceased, had he lived and prosecuted the suit. The court did not err in submitting this issue to the jury.

The foregoing language demonstrates that petitioners' view of the Utah law has been wrong. The decision of the Utah court that Van Wagoner's conduct in his lifetime was a bar to recovery by his heirs was not the announcement of a new rule in Utah. Rather it was an affirmance of the rule which has prevailed all the way back through the years to *Helfrich v. Railway Company*, 7 Utah 186, 26 Pac. 295, and still earlier times. That rule, according to the Van Wagoner decision, has persisted through the years unimpaired by either the *Mason* or the *Halling* case.

The language quoted above from the Utah decision makes it clear that the Utah law is in full harmony with

the rule announced by this court in *Northern Pacific v. Adams*, supra, *Michigan Central R. v. Vreeland*, supra, *Mellon v. Goodyear*, supra, etc.

Decedent in the case presently at bar accepted and used a free pass for interstate transportation, the conditions of which were binding upon him and his heirs alike by authority of all the cases we have cited above. Counsel may argue that the *Van Wagoner* case, supra, is distinguishable, because it involved negligent conduct in the decedent's lifetime. In their brief they seek support for such a fancied distinction by reference to 25 C.J.S. 1145. The editors of C.J.S there say that it has been held that a contract made by decedent in his lifetime cannot bind the heirs in a wrongful death case. They cite only two cases: *Adams v. Northern Pacific*, 95 F. 938, which was reversed by this court in *Northern Pacific v. Adams*, supra, and *Chicago, R. I. & P. Ry. Co. v. Martin*, 53 Pac. 461, 59 Kansas 437, which was overruled by *Sewell v. A. T. & S. F. Railway Co.*, 96 Pac. 1007.

The Utah Supreme Court in its last word upon the subject holds that the conduct of deceased in his lifetime does bind the heirs and that the heirs proceed with their lawsuit, "subject to the defenses against the deceased had he lived and prosecuted the suit."

As we pointed out in our earlier brief, *Halling v. Industrial Commission*, supra, arose under the workmen's compensation law of Utah. The right to recover compensation asserted in the *Halling* case had nothing to do with wrongful death or injury. The only question material there was whether death resulted from an industrial accident.

The *Van Wagoner* case, supra, makes it plain that the *Halling* case does not sustain petitioners' view. But we call attention to the fact that courts have judicially recognized a distinction between compensation cases and cases arising under wrongful death acts. In *Lewis v. Connolly Contracting Co.*, 264 N. W. 581, the Supreme Court of Minnesota, while recognizing the rule as announced in *Vree-*

land's case, pointed the distinction between wrongful death cases and compensation cases in this language:

> "The court in the Vreeland Case further said: 'But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.'
>
> "This clearly refers only to actions at law to recover for death caused by negligence or tort of the employer. It should have no application to a proceeding under a Workmen's Compensation Law such as ours, where the proceeding is not based on any original wrong. The cases cited under that quoted paragraph are all actions to recover for wrongful death."

In their brief at page 36, petitioners say:

> "It is granted that under the law of Idaho as construed in the *Adams* case, and under the Federal Employers' Liability Act, as declared in the *Vreeland*, *Mellon* and *Flynn* cases, supra, the wrongful act or default must be such that the decedent could have maintained an action to recover damages for his injuries if death had not ensued."

Since the *Van Wagoner* case makes it plain that Utah law is in harmony with the *Adams* case, we must conclude that even by petitioners' reasoning, petitioners are bound by the pass conditions.

Other Authorities

As this court said in *Mellon v. Goodyear*, supra; "By the overwhelming weight of judicial authority, where a statute of the nature of Lord Campbell's Act in effect gives a right to recover damages for the benefit of dependents the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such

injury." Typical of the host of cases going to make up the overwhelming weight referred to are: *James Baird Co. v. Boyd*, 41 F. 2d 578 (CCA 4th); *Seaboard Air Line Ry. v. Oliver*, 261 F. 1, (CCA 5th); *Western Union v. Preston*, 254 F. 229, (CCA 3rd); *Russell v. Cox*, 148 P. (2d) 221, (Idaho 1944) (The Idaho case just cited is interesting because the case reaffirms the interpretation of the Idaho death statute put upon it by this court in *Northern Pacific v. Adams*, supra); *Ryan v. Poole*, 47 P. (2d) 981, (Washington); *Sewell v. A. T. & S. F. Railway Company*, supra; *Mason v. Union Pacific Railroad Company*, supra.

In addition we invite the court's attention to certain well-respected texts: Restatement of the Law of Torts, Vol. 4, Section 925, page 639; Tiffany, Death by Wrongful Act, Second Edition, Sections 62 and 63, page 131; 16 American Jurisprudence, 61 and 78; 17 Corpus Juris, 1199-1201; Robert's Federal Liability of Carriers, Vol. 2, 2nd Ed., Section 900, page 1756. See also the annotation at 39 A. L. R. 579.

The length to which the logic of the petitioners' contention would carry them is demonstrated by the case of *Ryan v. Poole*, supra, which arose in the state of Washington and was ultimately decided by the Supreme Court of that state. There a brigand with felonious intent undertook to highjack a milk truck. While engaged in that criminal act he was killed by the truck driver. His heirs, completely deceived by the theory now espoused by counsel for the petitioners sought to recover for the death of the deceased on the theory that their cause of action came into existence only upon his death and was therefore freed of any impairment attaching to decedent's conduct in the circumstance which brought about his death. This is what the Supreme Court of Washington thought about it:

> "It is also generally held, and the decisions of this court are to the same effect, that, if a deceased could not have recovered damages for his injury had he survived, his heirs or personal representatives cannot recover, because their right of recovery

is dependent upon the right which the deceased would have had had he survived. If the deceased had no cause of action, none accrues to his heirs or personal representatives."

"The words 'wrongful act or neglect,' used in statutes of this nature in defining the quality of the act causing the injury and death, it seems to be universally agreed by the courts, mean wrong or neglect as against the deceased; that is, in the sense that the deceased could have recovered damages for the injury resulting in his death.

"Had Emmett C. Ryan survived his injury, and brought an action therefor, it is clear that he could not have prevailed, because at the time of the injury he was engaged in the performance of an unlawful and criminal act. The right of the appellant to recover being dependent upon the deceased's right, had he survived, it necessarily follows that the demurrer to the complaint was properly sustained. This may be measuring the rights of the heirs and personal representatives by the personal disability of the deceased, had he survived, but, if it be so, it is a conclusion which the settled law requires."

Motion for New Trial Properly Denied

Rule 59(b) of the Rules of Civil Procedure provides that a motion for a new trial shall be served not later than ten days after entry of judgment. Sub-section (c) of the same rule provides that when affidavits are relied upon they must be served with the motion; and sub-section (d) provides that not later than ten days after judgment the trial court on its own initiative may grant a new trial.

Judgment was entered in this case on May 2, 1946. On May 8, 1946, and within the time fixed by the rule, a motion for new trial was served upon respondent. That motion in no way questioned the manner in which the jury list was made up or the panel selected. On June 13, 1946, thirty-one days after the time within which to file the motion for a new trial had expired, petitioners filed another motion for new

trial. By paragraphs 16, 17, 18 and 19 of the new motion they attacked the jury panel, as well as the particular jury which tried the case. Then, for the first time, petitioners raised objection to the jury. Thereafter on June 18, 1946, thirty-six days after the time within which the rules permit the filing of such affidavits, petitioners filed certain affidavits purportedly in support of their motion for new trial. Respondent moved to strike the new motion for new trial and particularly paragraphs 16, 17, 18 and 19 thereof, and moved to strike the affidavits upon the ground that they were served and filed out of time. When the motion for new trial was called for argument, respondent renewed its motion and urged upon the trial court that the amended motion for new trial, and particularly paragraphs 16, 17, 18 and 19 thereof and the affidavits filed on June 18, 1946, were not properly before the court. (R. 44, 223-224) The same matter was called to the attention of the Circuit Court of Appeals. No ruling was ever made upon the motion to strike, but by its decision the Circuit Court of Appeals clearly recognized that the motion and affidavits had been filed after the time fixed by the governing rules of procedure. (R. 279, 280)

Counsel for petitioners have long practiced before the trial court. They maintain their offices within one block of the clerk's offices. Trial of this case was called for April 26, 1946. Approximately two weeks before that time the clerk of the court mailed to counsel for petitioners a list of the names from which the trial jury would be selected. (R. 234) Thereafter during the business hours of each day the clerk's office was open and persons were in attendance to answer any questions propounded concerning the jury. Counsel were free during all that time to make such inquiry as they might deem useful. It does not appear from the record that they ever bothered to make any such inquiry.

It does appear though, that counsel, possessed of the list of jurymen sent them by the clerk, came to court on the appointed day to participate in the selection of a jury. Upon convening of court counsel informed the trial judge that they were not ready to go to trial but were ready to

select a jury. (R. 46) Thereupon the requisite number of veniremen were called into the box and a jury was drawn and accepted by both sides. (R. 46, 62)

Following the exercise of challenges, counsel for both sides accepted a jury on April 26th. During the selection of the jury and prior thereto there was never a breath of criticism from petitioners' counsel as to the makeup of the panel or the competency of those upon the panel to serve. There never was an inkling that counsel might speculate on the jury as constituted for a verdict and then if disappointed seek to question the competency of the entire panel. The twelve persons selected by counsel for both sides to try th case were: Parley N. Winn, an employee in a feed store in Richmond, a farming village; Percy B. Wright, an employee of Bennett Glass and Paint Company, a corporation in the city of Ogden; Kenneth K. Leonardson, a grocer in the farming village of Kaysville; Jack Pogue, employed to drive a freight truck between Salt Lake City and Southern Utah; Marjorie McMurrin, a housewife from a farming community in Northern Utah; Theron R. Covey, manager of a dance hall in Salt Lake City; Carl W. Huhl, an employee of Z. C. M. I. Department Store in Salt Lake City; Lourie A. Bennett, manager of a local retail coal office in Salt Lake City; Vesta Cahoon, wife of a letter carrier; William Evans, Jr., employed in a garage in Logan, an agricultural community in Northern Utah; M. L. Jones, who repaired refrigerators in Bountiful, a farming community north of Salt Lake City; and O. Early House, a salesman in Tooele, an agricultural and mining village in Western Utah.

Counsel cannot with fairness now assert that the jury which they assisted in selecting did not represent a fair cross section of our population. As petitioners participated in the selection of the jury, they saw the persons in the box and listened to them as they answered respecting their qualifications. When face to face with those men and women, it never occurred to them that there was any cause to complain of their competency. It was not until a month after verdict that the idea first occurred to peti-

tioners to complain of the panel. It has always been the rule of the trial forum that if one intends to complain of the jury panel, he must do so before—not after—verdict. Inasmuch as a jury consists of only twelve persons, it certainly cannot be said that the foregoing twelve did not consitute a cross-section, representative of the activities of the State of Utah.

After the selection of the jury, the actual taking of evidence did not begin until April 29th. Two and one-half full days passed between the time counsel knew who their jury was to be and the taking of any evidence. The taking of evidence began on April 29th and was concluded on May 1st. The jury was instructed and retired to deliberate on the afternoon of May 1st. It returned its verdict into the court on the morning of May 2nd. During all of those proceedings there was never a word of criticism of the jury panel or the method of its selection. Settled law and the requirements of fair play demand that counsel make their objections before, not after, verdict.

Sharp emphasis is given to this rule by the decision of this court in *Queenan v. Territory of Oklahoma*, 190 U.S. 548, 47 L. Ed. 1175. Queenan was tried and convicted of murder in the Oklahoma court. After the jury had been selected and the trial had proceeded some days, it was made known to court and counsel that one of the jurors had been convicted of a felony in Nebraska, a fact which might have been urged as disqualifying the juror. The court inquired of counsel for defendant whether they desired to object to the jury as then constituted. Counsel answered that they had nothing to say. The trial proceeded to verdict and sentence. Thereafter defendant sought to take advantage of the juror's disqualification. Mr. Justice Holmes, speaking for this court in a decision affirming the Oklahoma court, closed with this language:

> "He could not speculate upon the chances of getting a verdict and then set up that he had not waived his rights."

The foregoing case is much stronger than the one now be-

fore the bar. Here no disqualification of any juror was ever shown. Every juror in the box was in all respects competent and qualified. To the same effect as *Queenan v. Territory of Oklahoma*, to which we have just referred, are *Holmes v. U. S.*, 134 F. (2d) 125, (C. C. A. 8th); *King v. Leach*, 131 F. (2d) 8, (C. C. A. 5th); *Spivey v. U. S.*, 109 F. (2d) 181, (C. C. A. 5th); *Carruthers, et al v. Reed*, 102 F. (2d) 933, (C. C. A. 8th); *Needham v. U. S.*, 73 F. (2d) 1, (C. C. A. 7th); *Union Electric Light and Power Co. v. Snyder Estate Co.*, 65 F. (2d) 297, (C. C. A. 8th); *Zito v. U. S.*, 64 F. (2d) 772, (C. C. A. 7th); *Strang v. U. S.*, 48 F. (2d) 1006, and 53 F. (2d) 820, (C. C. A. 5th); *Bush v. U. S.*, 16 F. (2d) 709 (C. C. A. 5th); *Browder v. Cook*, 59 F. Supp. 675, (D. C. Idaho); *U. S. v. Peterson*, 24 Fed. Supp. 470, (D. C. Pa.); *Monday v. State*, 23 S. W. (2d) 656, (Tenn.); *Knauf v. State*, 1 S. W. (2d) 619, (Texas); *Roush v. U. S.*, 47 F. (2d) 444, (C. C. A. 5th). See also *Bennett v. Tintic Iron Co.*, 9 Utah 291, 34 Pac. 61.

The Rules of Civil Procedure by rule 59 provide for the filing of motions for new trial. Rule 59(b) provides that "motion for a new trial shall be served not later than ten days after the entry of judgment." The only exception provided by the rule is to be found when the motion for a new trial is grounded on newly discovered evidence, in which case the motion may be made after the expiration of the period fixed by the rule "with leave of court obtained on notice and hearing and on a showing of due diligence" and that single exception has no application here.

On June 18th, five days after filing the new motion, and 36 days after the time provided by the rules, petitioners undertook to serve upon respondent and to file with the court numerous affidavits in support of paragraphs 16, 17, 18, and 19 of their new motion. Rule 59(c) provides in part: "When a motion for a new trial is based upon affidavits, they shall be served with the motion * * *." So if the Rules of Civil Procedure mean what they say, and the rules which we invoke seem to be free of any ambiguity, the motion filed on June 13th and the affidavits filed on June 18th, 1946, were not properly before the trial court and

should not be considered a part of the record on appeal. *Marshalls' U .S. Auto Supply, Inc., v. Cashman*, 111 F. (2d) 140, (C. C. A. 10th); *Safeway Stores, Inc., v. Coe*, 136 F. (2d) 771, (C. A. for D. C.); *Freid v. McGrath*, 133 F. (2d) 350, (C. A. for D. C.); *U. S. v. Newbury Mfg. Co., et al*, 123 F. (2d) 453, (C. C. A. 1); *Wolpa v. U. S.*, 84 F. (2d) 829, (C. C. A. 8th); *Peterson v. Chicago G. W. Ry. Co.*, 3 F. R. D. 346, (D. C. Neb.); *Audia v. Denver & Rio G. R. Co., et al*, 45 Utah 459, 146 Pac. 559; *Luke v. Coleman*, 38 Utah 383, 113 Pac. 1023; *Blue Creek Land and Livestock Co. v. Anderson*, 35 Utah 61, 99 Pac. 444.

Counsel made a belated effort to bring themselves within *Thiel v. Southern Pacific*, 328 U. S. 217, 66 S. Ct. 984. That case does not support counsels' position because in the *Thiel* case plaintiff raised and insisted upon his objection to the ury panel before a trial jury was ever drawn and to protect himself against waiver, pressed his objection to the jury panel at all appropriate times thereafter.

Counsel in this case never had any faith or confidence in their motion for new trial. When the matter came on for argument before the trial judge, counsel for petitioners at one point said:

> "It may be, your Honor might feel these affidavits are untimely, that the motion for a new trial should have been more complete and full at the time it was made. It may be the court will feel that the jury should have been challenged before the trial was started. I cannot change the record on that. * * *"

There was clear recognition that his motion was filed out of time and that his objection should have been made before the trial started.

To summarize briefly, it thus appears without contradiction in the record that appellants were not only provided well in advance of trial with a list of the jurors from whom the jury finally selected would be drawn, but were afforded ample time and opportunity to discover any and

all defects or irregularities which might exist in the manner of the original selection of all jurors for jury duty in the court. It likewise appears that petitioners announced themselves as being ready to select a jury and after such selection passed the jury for cause. Never once did petitioners give any indication of any dissatisfaction regarding the jury until after judgment had been entered and after their motion for a new trial had been filed. Then the counsel filed their belated motion for a new trial and called upon the court to correct an "apparent manifest" miscarriage of justice. It has been shown that petitioners' new motion and subsequent affidavits raising the jury question came too late.

One additional fundamental principle of law precludes this matter being now properly before this court, for it is well settled that an order of the trial court denying a new trial is not reviewable on writs of error, it being a discretionary matter with the trial court and except for a clear abuse of that discretion such ruling will not be disturbed. *U. S. v. Socony-Vacuum Oil Company,* 310 U. S. 150, 84 L. Ed. 1129; *Fairmount Glass Works v. Cub Fork Coal Co.,* 287 U. S. 474, 77 L. Ed. 439; *Blytheville Cotton Oil Co. v. Kurn,* 155 F. (2d) 467, (C. C. A. 6th 1946); *Lemly v. Christopherson,* 150 F. (2d) 291, (C. C. A. 5th, 1945); *Jordan v. Fed. Farm Mtg. Co.,* 152 F. (2d) 642, (C. C. A. 8th, 1945); *Gerson v. Anderson-Prichard Production Corp.,* 149 F. (2d) 444, (C. C. A. 10th, 1945) (citing *Long v. U. S.,* 139 F. (2d) 652, (C. C. A. 10th)); *Daffinrud v. U. S.,* 145 F. (2d) 724, (C. C. A. 7th, 1944); *U. S. v. Bransen,* 142 F. (2d) 232, (C. C. A. 9th, 1944); *McDonough et al. v. U. S.,* 299 Fed. 30, (C. C. A. 9th, 1924). The action of the court below in hearing all of petitioners' evidence, affidavits and argument on this jury question while yet reserving its ruling on the motions to strike and the objections of respondent that such were never properly before the court makes it "manifestly apparent" that petitioners' claim of abuse of discretion is untenable. See *U. S. v. Socony-Vacuum Oil Co.*, supra, *McDonough, et al v. U. S.,* supra.

CONCLUSION

The judgment of the Circuit Court of Appeals that the conditions of the free pass are binding upon deceased in his lifetime and to the same extent upon petitioners, is in complete accord with applicable decisions of this court and of the highest court of Utah. Its judgment affirming the trial court's order denying petitioners' motion for new trial is in accord with the clear language of the Rules of Civil Procedure and applicable authority.

WHEREFORE, it is respectfully submitted that the judgment of the court below should be affirmed.

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and
GRANT C. AADNESEN
Of Counsel

Justice Black's
pp. 5, 7, 9, 13, 14, 15, 19,

SUPREME COURT OF THE UNITED STATES

No. 400.—October Term, 1947.

Jackie Packer Francis, A Minor, Denny Ray Francis, A Minor, and James Brent Francis, A Minor, By and Through Their General Guardians, Ray E. Francis and Virgil O. Packer, Petitioners,
v.
Southern Pacific Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[March 15, 1948.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioners are the minor children of Jack R. Francis who was killed while riding as an interstate passenger on one of respondent's trains. They brought this suit, acting through their general guardians, to recover damages on account on his death. Jurisdiction in the federal court was founded on diversity of citizenship. The trial judge submitted to the jury only the question of respondent's wanton negligence. The error alleged is his refusal to submit to the jury the issue of ordinary negligence. The jury returned a verdict for respondent. The Circuit Court of Appeals affirmed. — F. 2d —.

The Circuit Court of Appeals held that Utah law creates a right of action in the heirs for the wrongful death of the decedent and that the action is distinct from any which decedent might have maintained had he survived. But the court held that the action is maintainable only where the decedent could have recovered damages for his injury if death had not ensued. In this case the decedent, an employee of respondent, was riding on a free

pass not in connection with any duties he had as an employee but as a passenger only. The Circuit Court of Appeals therefore held as a matter of federal law that respondent would not have been liable to decedent for damages caused by ordinary negligence, relying on *Northern Pacific R. Co.* v. *Adams*, 192 U. S. 440. It concluded that respondent had the same defense against the heirs. We granted the petition for a writ of certiorari to reexamine the relationship between local law and federal law respecting the liability of interstate carriers under free passes.

In *Van Wagoner* v. *Union Pac. R. Co.*, — Utah —, 186 P. 2d 293, decided after the petition for certiorari in the present case was filed, the heirs sued to recover damages for the death of the decedent in a grade-crossing accident. The court held that a defense of contributory negligence which would have barred recovery by the decedent likewise bars the heirs. In view of this ruling by the Utah Supreme Court we cannot say that the Circuit Court of Appeals committed plain error in holding that respondent had the same defenses against petitioners as it would have had against the decedent.[1] Yet it requires such

[1] The Utah Supreme Court in its original opinion in the *Van Wagoner* case stated that the right granted the heirs is a "right to proceed against the wrongdoer subject to the defenses available against the deceased had he lived and prosecuted the suit." On petition for rehearing that statement was eliminated and the following one substituted: "Under the facts of this case the right to proceed against the wrongdoer is subject to the defense of contributory negligence."

That ruling is no deviation from the Utah law as construed by the lower federal courts. It supports the view of Utah law taken by the Circuit Court of Appeals and is in line with the weight of authority in the state courts. See *Mellon* v. *Goodyear*, 277 U. S. 335, 344–345. Hence we do not deem it appropriate to remand the case for consideration of the intervening decision in the *Van Wagoner* case. Cf. *Huddleston* v. *Dwyer*, 322 U. S. 232.

showing of error for us to overrule the lower courts in their applications of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. See *Palmer* v. *Hoffman*, 318 U. S. 109, 118; *Mac Gregor* v. *State Mutual Co.*, 315 U. S. 280; *Steele* v. *General Mills*, 329 U. S. 433, 439. Cf. *Wichita Co.* v. *City Bank*, 306 U. S. 103.

The free pass in the present case stated that "the user assumes all risk of injury to person or property and of loss of property whether by negligence or otherwise and absolves the issuing company . . . from any liability therefor." In *Northern Pacific R. Co.* v. *Adams, supra*, a similar provision in a free pass was sustained as a defense to an action brought under an Idaho statute by the heirs of a passenger.[2] That was in 1904. The *Adams* decision was soon followed by *Boering* v. *Chesapeake Beach R. Co.*, 193 U. S. 442. Then in 1906 came the Hepburn Act which under pain of a criminal penalty prohibited a common carrier subject to the Act from issuing a "free pass" except, *inter alia*, to "its employees and their families." 34 Stat. 584, 49 U. S. C. § 1 (7). Thereafter in 1914 the Court held that the rule of the *Adams* case

[2] The Court said, pp. 453–454:

"The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted that privilege cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby."

was applicable under the federal statute and that the "free pass" was nonetheless a gratuity though issued to an employee of the carrier. *Charleston & W. C. R. Co.* v. *Thompson*, 234 U. S. 576. *Kansas City So. R. Co.* v. *Van Zant*, 260 U. S. 459, followed in 1923 and held that the liability of an interstate carrier to one riding on a "free pass" was determined not by state law but by the Hepburn Act. The Court said, p. 468, "The provision for passes, with its sanction in penalties, is a regulation of interstate commerce to the completion of which the determination of the effect of the passes is necessary. We think, therefore, free passes in their entirety are taken charge of, not only their permission and use, but the limitations and conditions upon their use. Or to put it another way, and to specialize, the relation of their users to the railroad which issued them, the fact and measure of responsibility the railroad incurs by their issue; and the extent of the right the person to whom issued acquires, are taken charge of."

For years this has been the accepted and well-settled construction of the Hepburn Act. During that long period it stood unchallenged in this Court and, so far as we can ascertain, in Congress too. Then came the Transportation Act of 1940, 54 Stat. 898, 900, with its comprehensive revision of the statutes of which the Hepburn Act was part. Amendments were made to the free-pass provision of the Act to permit free transportation of additional classes of persons.[3] No other amendments to the free-pass provision were made. It was reenacted without further change or qualification. In view of this history we do not reach the question of what construction we would give the Hepburn Act were we writing on a clean slate. The extent to which we should rely upon such

[3] See H. R. Rep. 2016, 76th Cong., 3d Sess, p. 59.

history is always a difficult question which has frequently troubled the Court in many fields of law and with varied results. See *Girouard* v. *United States*, 328 U. S. 61, 69, 70; *Helvering* v. *Hallock*, 309 U. S. 106, 119, 123. But in the setting of this case, we find the long and well-settled construction of the Act plus reenactment of the free-pass provision without change of the established interpretation most persuasive indications that the rule of the *Adams*, *Thompson*, and *Van Zant* cases has become part of the warp and woof of the legislation. See *Missouri* v. *Ross*, 299 U. S. 72, 75; *United States* v. *Elgin, J. & E. R. Co.*, 298 U. S. 492, 500; *United States* v. *Ryan*, 284 U. S. 167, 175; *Hecht* v. *Malley*, 265 U. S. 144, 153; *Electric Battery Co.* v. *Shimadzu*, 307 U. S. 5, 14. Any state law which conflicts with this federal rule governing interstate carriers must therefore give way by virtue of the Supremacy Clause. For it was held in the *Van Zant* case that the free-pass provision of the Hepburn Act was a regulation of interstate commerce "to the completion of which the determination of the effect of the passes is necessary." Thus there is no room for the application of *Erie R. Co.* v. *Tompkins*, *supra*, on this phase of the case. The *Van Zant* case arose not in a lower federal court but in a state court; the holding was not a declaration of a "general commercial law" but a ruling that "the incidents and consequences" of the pass were controlled by the federal act "to the exclusion of state laws and state policies." 260 U. S. at 469.

Petitioners contend that the jury panel from which the jury in this case was selected was drawn contrary to *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217. We do not stop to inquire into the merits of the claim. The objection was made for the first time in the motion for a new trial. It seems to have been an afterthought, as the *Thiel* case was decided a few weeks after the verdict of the jury in

the present case. If not an afterthought, it is an effort to retrieve a position that was forsaken when it was decided to take a gamble on the existing jury panel. In either case the objection comes too late. Cf. *Queenan* v. *Oklahoma*, 190 U. S. 548, 552.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 400.—October Term, 1947.

Jackie Packer Francis, A Minor, Denny Ray Francis, A Minor, and James Brent Francis, A Minor, By and Through Their General Guardians, Ray E. Francis and Virgil O. Packer, Petitioners, *v.* Southern Pacific Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[March 15, 1948.]

Mr. Justice Black, with whom Mr. Justice Murphy and Mr. Justice Rutledge join, dissenting.

Utah law permits recovery against a railroad when its negligence is responsible for a passenger's death, whether that passenger rides on a free pass containing an attempted waiver of liability for negligence or pays his fare in money. Because I believe Utah law should govern this case I would reverse this judgment. But I think affirmance of the judgment is equally wrong whether the case is to be considered governed wholly by Utah law, by federal law, or in part by both.

No act of Congress has entrenched upon the long-existing power of all the states, including Utah, to provide damages for such wrongful deaths as this complaint alleged. If there is here any barrier to recovery based upon federal law, it is grounded in judge-made "general commercial law" announced by this Court in the year 1904 in *Northern Pac. R. Co.* v. *Adams*, 192 U. S. 440. The rule laid down in that case was that a railroad could by stipulation validly exempt itself from liability under a state statute for negligent injuries inflicted within that state upon passengers carried wholly gratuitously. Creation of the 1904 *Adams* rule by this Court was under

authority of a power then exercised, but repudiated in 1938 in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, whereby federal courts, in passing upon questions of state law upon which there was no controlling state legislative enactment, declared the "general commercial law" of a state on the federal court's notion of wise public policy, independently of state court decisions.

This Court followed the *Adams* "general commercial law" state rule several times between its creation in 1904 and repudiation of this Court's power to create state law in 1938—the last application of the *Adams* rule having been made by this Court in 1923 in *Kansas City So. R. Co.* v. *Van Zant*, 260 U. S. 459. That decision stated that an act of Congress had made the effect of the conditions in an employee's pass a federal question, but decided that "federal" question entirely by reliance on the old *Adams* "general commercial law" state rule. Since the *Erie-Tompkins* decision in 1938, and in fact since 1923, the *Adams* rule has never been applied by this Court until today. Now it is applied not as a federally created state rule of "general commercial law" but as a judicially created post-*Erie-Tompkins* rule of purely federal law. While this Court may look to the 1904 pre-*Erie-Tompkins* state rule of general commercial law "as a convenient source of reference for fashioning" a post-*Erie-Tompkins* federal rule, *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 367, it should not, as the Court does here, automatically accept the old state rule as a federal rule, without any appraisal of its soundness in relation to present day conditions. No such appraisal has been made here. The old *Adams* rule, questionable enough in its 1904 environment, should in my judgment be critically examined and then abandoned as wholly incongruous with the accepted pattern of our modern society as embodied in legislative enactments.

Furthermore, the 1904 *Adams* rule, even in its original narrow scope, marked a departure from the philosophy

of this Court's previous decisions. One subsequent line of the Court's decisions has tended to limit the 1904 rule's scope while another has tended to expand it. Today's opinion expands that rule beyond any point it has before reached. As indicated, I think the *Adams* "general commercial law" state rule is an obstacle to the execution of present congressional policies embodied in statutes. That obstacle I think should be removed by this Court which fashioned the old rule. In any event, I certainly would not expand the old *Adams* rule to cover the facts of this case.

I.

It should be noted at the outset that tort law has been fashioned largely by judges, too largely according to the ideas of many. But if judges make rules of law, it would seem that they should keep their minds open in order to exercise a continuing and helpful supervision over the manner in which their laws serve the public. Experience might prove that a rule created by judges should never have been created at all, or that their rule, though originally sound, had become wholly unsuited to new physical and social conditions developed by a dynamic society. A revaluation of social and economic interests affected by the old rule might reveal the unwisdom of its expansion or imperatively require its revision or abandonment.

The Court's uncritical reliance today on the 1904 judicially created rule, which to me is both undesirable and uncertain in scope, emphasizes one of the inherent dangers in judge-made laws pointed out by an eminent legal commentator in the field of tort law. Professor Bohlen, in his Studies in the Law of Torts, 610–611 (1926), had this to say about "dangers" of court-made tort standards: "The first is that of the undue rigidity which results from the unfortunate feeling, that any decision of a court creates a rule of law which, as law, is absolutely and eternally

valid . . . . To regard a standard of conduct as fixed and immutable because judicially announced, is to create a standard which however just or even necessary at the time, may become a scandal and a hissing in the future."[1]

II.

In 1944, Jack Francis, age 30, his wife, age 29, and their three children, ages 3, 6, and 8, lived in Carlin, Nevada. Jack was then and had been for several years a conductor and brakeman for the respondent, Southern Pacific Company. His father, Ray E. Francis, had served the respondent in the same capacity for 35 years. The elder Francis and his wife lived in Ogden, Utah, and the young Francis family visited them Christmas week. In the early morning of December 31, Jack and his wife boarded a Southern Pacific train at Ogden bound for Carlin. They took seats in the rear car. Both had passes granted by the respondent because the husband was its employee. Each pass contained a printed stipulation that the user assumed "all risk of injury to person" and absolved the railroad "from any liability therefor."

[1] Mr. Justice Cardozo said this about the quest for unvarying and eternal certainty in the law: "I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile . . . . As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born." *The Nature of the Judicial Process*, Benjamin N. Cardozo, 166–67 (1921). "Somewhere between worship of the past and exaltation of the present, the path of safety will be found." *Id.* at 160.

A short distance out of Ogden, while the train was still in Utah, an engine and train of cars crashed into the rear car. Husband and wife were killed.

This is one of two suits brought against the railroad by the grandparents as guardians of the three children to recover damages on account of their parents' deaths. The actions were brought under a Utah law since Congress has never passed any act which provides remedies against railroads for negligently injuring or killing railroad passengers, even interstate passengers on interstate railroads. Whether passengers or their dependents shall have a right of action under such circumstances has been a question left by Congress for regulation by the state in which the injury or death occurred. See, *e. g.*, *Chicago, R. I. & P. R. Co.* v. *Maucher*, 248 U. S. 359, 363. See also cases collected in 76 A. L. R. 428–435.

For many years the states did not generally authorize suits for wrongful death. Their omission of such remedies was due to traditional "common law" hostility to recoveries for death. This hostility provoked much lay criticism, echoes of which may be found in the cases cited below.[2] About the middle of the last century because of "dissatisfaction with the archaisms of the common law," state legislatures began to ~~authorize~~ suits for wrongful death and now all states have such statutes. *Van Beeck* v. *Sabine Towing Co.*, 300 U. S. 342, 346, 351. So strong is Utah's antipathy to the common law attitude that Art. XVI, § 5, of the Utah Constitution forbids the state legislature to abrogate the right to recover damages for wrongful death. This suit for damages was brought under the

[2] *Van Amburg* v. *Vicksburg, S. & P. R. Co.*, 37 La. Ann. 650, 651, 65, 55 Am. Rep. 517, 518; *Rowe* v. *Richards*, 35 S. D. 201, 206–207, 151 N. W. 1001, 1003; *Salsedo* v. *Palmer*, 278 F. 92, 94; *Maney* v. *Chicago, B. & Q. R. Co.*, 49 Ill. App. 105, 112–113. For a discussion of the state wrongful death statutes, see annotations: [illegible] L. R. A. (N. S.) 1075; 23 A. L. R. 1262; 27 L. R. A. (N. S.) 176.

abolish the common law rule by specifically authorizing d.

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Utah statute enacted in accordance with that state constitutional policy. Utah Code Ann. § 104–3–11 (1943). And in a case involving a federal wrongful death statute this Court has said "It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied" by such statutes. *Van Beeck* v. *Sabine Towing Co., supra* at 350–351.

One count of the complaint here alleged ordinary negligence; the other alleged gross negligence. Either type of negligence would justify a recovery under the Utah statute. And since the complaint claimed recovery under the Utah statute, liability, if any, springs from that statute. See *Spokane & I. E. R. Co.* v. *Whitley*, 237 U. S. 487, 494–495. Under Utah law the railroad here could not have defeated liability in this case on the ground that the passes stipulated that the users would assume the risk of injury. The trial judge charged the jury, however, that because of opinions of this Court the pass exemption stipulation was valid and barred recovery "for just ordinary negligence." The Circuit Court of Appeals affirmed on the basis of this Court's *Adams* and *Van Zant* cases. 162 F. 2d 813, 816. The action of the two lower courts was in accordance with their interpretation of this Court's opinions notwithstanding the fact that long ago the Utah Supreme Court, in declaring state law, rejected such a contention in the following language: "It is argued that even if the ticket was a free pass gratuitously possessed with the conditions printed thereon, still the defendant could not escape liability for its negligence. We believe the plaintiff is right in this contention." *William* v. *Oregon Short Line R. Co.*, 18 Utah 210, 221, 54 P. 991, 994 (1898). See also *Houtz* v. *Union Pacific R. Co.*, 33 Utah 175, 179, 93 P. 439, 441; *Hansen* v. *Oregon Short Line R. Co.*, 55 Utah 577, 581–582, 188 P. 852, 854. This Court has itself recognized and acted on the fact that it is the law of Utah that "when a common carrier accepts

a person as a passenger, he is not permitted to deny that he owes to him the duty of diligence, prudence and skill, which as carrying on a public employment, he owes to all his passengers; and that he cannot escape liability for a negligent performance of that duty, resulting in injury by urging that the pass or commission was issued, or the gratuitous carriage permitted, by him, in violation of law." *Southern Pac. Co.* v. *Schuyler*, 227 U. S. 601, 609–610.[3]

In the *Schuyler* case this Court sustained a Utah judgment under the Utah wrongful death statute, which judgment permitted recovery for death of a "gratuitous" passenger killed while riding free, although assuming he was not a member of a group to whom the carrier might lawfully issue passes under the Hepburn Act. The *Schuyler* case held that the Hepburn Act did not deprive Schuyler,

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[3] The recent *Van Wagoner* Utah Supreme Court decision cited by the Court is not out of harmony with the above cases but, as amended on rehearing, is expressly limited to a holding that contributory negligence of a decedent may bar recovery under the Utah statute on the part of his heirs. That holding simply means that the death was not "wrongful" under the statute. It does not mean that where there is company negligence Utah would hold that a railroad could barter away the beneficiary's rights.

And as I read the opinion of the Circuit Court of Appeals in the case now before us, it did not hold that under Utah law "an action is maintainable only where the decedent could have maintained an action to recover damages for his injury if death had not ensued." For that statement in its opinion, the Circuit Court of Appeals relied only on the *Adams* case and several other opinions of this Court. It did not purport to be construing Utah law. On this point, therefore, there is no question presented as to whether the Circuit Court of Appeals made a "plain error" in the construction of state law. The state law on that subject has been very clearly stated by the State Supreme Court to the effect that it "is beyond the power of the Legislature to take from the dependents of an employee their claim against the employer, where such employee dies as a result of a wrongful injury by the employer." *Halling* v. *Industrial Comm'n of Utah*, 71 Utah, 112, 120–121, 263 P. 78, 80, 81.

who violated it, "of the benefit and protection of the law of the state," because "such a violator" was "a human being, of whose safety the plaintiff in error [railroad] had undertaken the charge." Jack Francis and his wife were not violators of the Hepburn Act or any other act, federal or state. Each of them "was a human being of whose safety the railroad had taken charge." But by today's decision their children are denied the benefit of Utah's law. A federal rule of law is said to compel this Court to bar recovery under Utah's statute.

III.

What is this federal rule of law? Where did a rule emanate which today constrains this Court, without appraisal of the rule's scope or merits, to deny these children a right to recover damages from a railroad that negligently killed their parents? I say "negligently killed" because that must be assumed since the Court affirms a judgment against the children in a case where the jury was denied a right to award damages for a killing caused by the "ordinary negligence" of the railroad.

The Court points to no records and I can find not a single shred of evidence that Congress has ever directly or indirectly, explicitly or impliedly, through the Hepburn Act, or through any other act, authorized railroads to contract against liability for their negligence which results in the injury or death of a railroad employee or any other person legally riding on a railroad pass. The original rule followed in an expanded form by the Court today is actually a judicial product of the old days of *Swift* v. *Tyson*, 16 Pet. 1 (1842), days in which federal courts invoked "a transcendental body of law, outside of any particular State, . . . using their independent judgment as to what it was." Holmes, J., dissenting, *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.*, 276 U. S. 518, 533.

As already pointed out, our decision in *Erie R. Co.* v. *Tompkins, supra,* repudiated in toto the old *Swift* v. *Tyson*, "transcendental" or "general commercial law" power of federal courts. But as I see this case, the Court now perpetuates and strengthens the old rule based on the repudiated *Swift* v. *Tyson* doctrine, and the rule applied today rests on no other foundation than a completely uncritical adoption of this Court's 1904 "independent judgment." That judgment held it to be bad public policy, indeed, offensive to the Court's "moral sense," for a state to provide that an injured passenger who rode on a wholly gratuitous and guest basis could recover damages if a railroad had cautiously stipulated in advance that such a free passenger must assume the risks of railroad negligence. An investigation of the evolution of the "rule" from its 1904 beginning and application to its much broader application today will demonstrate, I believe, that it is rooted now, as in 1904, in nothing but the original "transcendental general law" source.

IV.

The background of the 1904 rule throws light on its judicial "general law" origin. In 1852 this Court was unable to find any difference between the kind of duty owed by a railroad to its paying and non-paying passengers; "public policy and safety" were held to require that a railroad exercise "the greatest possible care and diligence" for the safety of all passengers, and any less measure of care entitled an injured passenger to recover. *Philadelphia & Reading R. Co.* v. *Derby*, 14 How. 468, 486-487.[4] This principle was reaffirmed the next year in 485-486

[4] The Court said: ". . . It is true, a distinction has been taken, in some cases, between simple negligence, and great or gross negligence; and it is said, that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference

a water carriage case "as resting not only on public policy, but on sound principles of law." *The Steamboat New World, et al.* v. *King*, 16 How. 469, 474; and see to the same effect *New York C. R. Co.* v. *Lockwood*, 17 Wall. 357, 382–383. In 1873, this Court in an elaborate and well-reasoned opinion held that it was against the public interest and public policy to permit common carriers to stipulate against the results of the negligence of themselves or their agents, and that while the rule applied both to carriage of goods and passengers, it applied with "special force to the latter." *New York C. R. Co.* v. *Lockwood*, *supra* at 384. The passenger in the *Lockwood* case was a drover traveling on a free pass to look after cattle; the Court reserved decision as to whether the rule would apply to a strictly free passenger. Four years later the Court applied the same reasoning to a railroad-designated "free pass" passenger, finding that in fact there was consideration for the carriage and that it was not a "matter of charity" or a "mere gratuity." *Grand Trunk R. Co.* v. *Stevens*, 95 U. S. 655, 658, 660. The *Lockwood* and *Stevens* cases plainly stand for the principle that where there is any benefit derived by the railroad a pass is not "free," and that a passenger riding on such a pass may recover for injuries due to the railroad's negligence, regardless of stipulations in his pass.

In the *Lockwood* case this Court refused to follow decisions of the Supreme Court of New York, the State

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(if it be capable of definition,) as the verdict has found this to be a case of gross negligence.

"When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.'"

where the carriage contract was made and where the accident occurred, but instead, since there was no controlling New York statute, expressly decided the point as one of "general commercial law." 17 Wall. at 368. And see *Chicago, Milwaukee & St. P. R. Co.* v. *Solan*, 169 U. S. 133, 136–137. Out of this "general commercial law" background emerged the "rule" relied on by the Court in the *Adams* case.

V.

The beginning of the doctrine that a railroad could by stipulation exempt itself from liability for negligent injury to strictly free passengers was in *Northern Pac. R. Co.* v. *Adams, supra*, and *Boering* v. *Chesapeake Beach R. Co.*, 193 U. S. 442, both decided in 1904. The decisions in these cases bear internal proof that they rested on the "general commercial law" ground. The *Adams* opinion treated the newly announced doctrine as no more than a special exception to the rule of "general commercial law" of the *Lockwood* case, which rule denied railroads power to exempt themselves from the effects of their negligence through the device of "free" passes.

As bearing on the narrow scope of the *Adams* rule and its "transcendental law" origin, it is of importance that the *Adams* and *Boering* cases were decided in 1904, two years before Congress outlawed political passes in the Hepburn Act. There existed at that time a widespread hostility to the use of "strictly free" railroad passes. The pass in the *Boering* case as well as in the *Adams* case was "strictly free." Adams, the deceased, was a lawyer but not employed by the railroad that gave him the pass. Many believed, as shown by the legislative history of the Hepburn Act, that railroads were using passes to influence public men to favor railroads at the expense of the public good. Consequently, pass givers and pass users of

"strictly free" passes as distinguished from givers and users of employees' passes, were in bad repute. The *Adams* and *Boering* decisions plainly reflect this sentiment. Both decisions spotlighted the importance of having "those who accept gratuities and acts of hospitality" stand by their contracts to assume the risks of injury incident to riding. In the *Lockwood* and *Stevens* cases, where no money was paid for passage, but neither carriage was strictly free, interests of the public in a carefully operated railroad system were expressly held to outweigh sanctity of contracts and all other considerations; in the *Adams* and *Boering* cases, sanctity of contracts, particularly contracts made to obtain strictly free transportation, was given greater weight than the public's interest in safe transportation.[5] But all the cases alike turned out judge-made rules of "general commercial law." Now let us follow the *Adams* rule to its appearance in other cases relied on by the Court today for the statement that this rule of "general commercial law" has become part of the "warp and woof" of the Hepburn Act.

Charleston & W. C. R. Co. v. *Thompson*, 234 U. S. 576, is the next case relied on here. It was decided in 1914, eight years after passage of the Hepburn Act, which had, with certain exceptions, prohibited issuance of passes by railroads. 34 Stat. 584, 49 U. S. C. § 1 (7). The suit was brought by the wife of a railroad employee to recover for injuries sustained by her while an interstate railroad passenger riding on a pass. The Court of Appeals of Georgia considered it to be the general rule that strictly free pass passengers could not recover for injuries if their passes contained a stipulation requiring the passenger to

[5] A note appended to the *Lockwood* case as reported in 21 L. Ed. 627 cites cases in support of the position there taken that the *Adams* rule was contrary to the weight of judicial authority. And see 22 L. R. A. 794; 37 L. R. A. (N. S.) 235; 37 Ann. Cas. 623.

assume the risk of railroad negligence. But that court went on to hold that the Hepburn Act, by specifically authorizing issuance of passes to railroad employees and their families, had put them in a different category from "purely gratuitous" passengers. The court regarded passes issued to members of an employee's family as partial compensation for the employee's services, and for that reason distinguished persons riding on such passes from strictly free pass passengers, to whom the harsh *Adams* rule applied. 13 Ga. App. 528. This Court reversed, saying that "The main question is whether when the statute permits the issue of a 'free pass' to its employés and their families it means what it says." It did not find that the pass on which the injured wife of the employee had ridden was free in fact, but held that the "pass was free under the statute," thereby treating employees' passes as though they were strictly free, without stating any reason except that the Hepburn Act had referred to passes as "free." *Cf. Norfolk Southern R. Co.* v. *Chatman*, 244 U. S. 276, 280–281. The Court then went further and upheld the pass stipulations for railroad exemption from liability for negligence. But the Court did not at all rely on the Hepburn Act for this latter holding. Instead it was said that "As the pass was free under the statute . . . the validity of the stipulations" was "established by the decisions of this court," relying completely upon the *Adams* and *Boering* cases. Thus the *Charleston & W. C. R. Co.* case did not discover the *Adams* rule in an act of Congress; the rule it relied on had been judicially created in 1904 by an exercise of the Court's "transcendental" law power.

Kansas City So. R. Co. v. *Van Zant*, 260 U. S. 459, decided in 1923, is the next and the last case relied on by the Court today. That case decided that the "incidents and consequences" of an employee's pass raise a federal question. *Cf. Southern Pac. Co.* v. *Schuyler*, 227

U. S. 601, 610; *Chicago, R. I. & Pac. R. Co.* v. *Maucher*, 248 U. S. 359, 363. It then repeated the statement made in *Charleston & W. C. R. Co.* v. *Thompson*, *supra*, that an employee's pass transportation is "free," again without any explanation of why. To this extent it may be said that the Court was then construing the Hepburn Act, though I think its construction was wrong. But the Court did not, even in this last case (1923), hold or intimate that the Hepburn Act of itself put employee-pass passengers in a separate class, to be negligently killed or injured with impunity. To degrade railroad employee passengers to this unfortunate level this Court in the *Van Zant* case again relied on the rule it had fashioned in the *Adams* and *Boering* decisions. So long as one agreed with the soundness of the *Adams* case rule and with this Court's exercise of a power to declare "general commercial law" under the *Swift* v. *Tyson*, doctrine, the result of the *Van Zant* case could not be questioned in 1923. But that was fifteen years prior to *Erie R. Co.* v. *Tompkins*, *supra*, in which we abandoned the "transcendental" law doctrine, as typified by the *Adams* rule, and today's decision is ten years after we took that salutary step.

In applying this pre-*Erie-Tompkins* court-made transcendental law rule at this time, the Court not only in part neutralizes our *Erie-Tompkins* decision. It actually leaves a rule standing which might have already fallen under the repudiated *Swift* v. *Tyson* doctrine so far as it governed. For though a purely transcendental law rule judicially created by this Court under the pre-*Erie-Tompkins* doctrine was "none the less the law of the State," it need only have remained the "law of the State" until "changed by its legislature." *Chicago, Milwaukee, St. P. R. Co.* v. *Solan*, 169 U. S. 133, 136–137. Hence, had the *Swift-Tyson* doctrine not been repudiated, the *Adams* rule as applied to persons injured in Utah should have fallen of its own weight had the Utah legislature

passed a law authorizing a man's children to recover from a railroad that negligently killed their parents while they were "free pass" passengers. Utah has a statute broad enough to authorize such recoveries. The only barrier to recovery under that state statute is grounded on a court-announced "commercial law" rule, a poor excuse indeed for depriving a state of exercising its traditional power to control actions for local wrongful deaths. Of course this is an interstate carrier and we should not constrict congressional powers over it by narrow statutory interpretations. *Cf. Federal Trade Comm'n* v. *Bunte Bros.*, 312 U. S. 349. But the very absence of a federal statute to take the place of local wrongful death statutes should be the equivalent of a loud congressional warning to courts to refrain from encroaching on state powers here.

VI.

It is said however that Congress, although aware of the *Adams* transcendental law rule, has never changed it. Indulging for the moment the convenient fiction that Congress knows all about that rule and what it means, why should it think that old rules laid down by this Court and based on the *Swift* v. *Tyson* doctrine could survive our decision in *Erie* v. *Tompkins*? And why should Congress think that a rule which had never been applied by this Court to bar the children of a deceased employee would be extended to bar recovery by those children? I venture the suggestion that it would be shocking to members of Congress, even those who are in closest touch with interstate commerce legislation, to be told that their "silence" is responsible for application today of a rule which is out of step with the trend of all congressional legislation for more than the past quarter of a century. There are some fields in which congressional committees have such close liason with agencies in regard to some

matters, that it is reasonable to assume an awareness of Congress with relevant judicial and administrative decisions. But I can find no ground for an assumption that Congress has known about the *Adams* rule and deliberately left it alone because it favored such an archaic doctrine.[6] I reject the idea that Congress ever has approved such a rule, and none of its legislation for the past quarter of a century indicates that it ever would have approved it.

VII.

The legislative history of the Hepburn Act's free pass provision shows that application of the *Adams* doctrine to employees' passes is not in accordance with but directly hostile to the congressional purpose in permitting employee passes. That Congress never would have passed an Act which so penalized employees, may be seen by reading even the few portions of the Congressional Record and committee reports cited below.[7] In very brief summary that history shows:

Prior to 1906, there grew up a demand by the people that railroads cease discriminating against some shippers

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[6] The Transportation Act of 1940, 54 Stat. 899, 900, 49 U. S. C. 1 (7), expanded the groups eligible to ride on "free passes." But no language used in that Act and no legislative history that I have found indicates any congressional knowledge of the existence of the penalizing *Adams* rule, much less approval of it. Far from indicating a purpose to acquiesce in any kind of reduced employee protection, Congress in § 7 (2) (f) of that Act, 49 U. S. C. § 5 (2) (f), provided a new and extraordinary protection for employees whose jobs might be affected by railroad mergers and consolidations. See Sen. Rep. No. 433, 76th Cong., 1st Sess., 4, 21; H. R. No. 2832, 76th Cong., 3d Sess., 68–69; *Interstate Commerce Comm'n* v. *Railway Labor Assn.*, 315 U. S. 373, 379–380.

[7] 40 Cong. Rec. 7741, 7851–7852, 7920–7940, 7978–7998. The following statement is typical of the sentiment that brought into the Hepburn Act the exception that permitted issuance of passes to and

in favor of others and cease using free passes as a means to obtain special favors from public officials and administrative agencies. Public complaint was not against employees using passes. In fact, some unions had bargaining agreements for passes, and Congressmen who spoke on the Hepburn bill considered employees' passes to be a part of the inducement to work for railroads. Passes were spoken of by those who discussed legislation on the House and Senate floors as part of the compensation of employees. The subject was an important one and was so treated. At one time a conference report recommended to both houses that all passes be prohibited. 40 Cong. Rec. 7741. This report was defeated and the debates indicate that it would have been difficult to pass a bill which failed to permit issuance of passes to railroad employees—not in the spirit of giving alms to beggars or favors to politicians, but to requite men for faithful work.

If any senator or congressman discussing the Hepburn Act had ever heard of the *Adams* rule, he failed to mention it. But it must be conceded there was no reason for him

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use of them by employees: "While I am on my feet I will take the opportunity to say in regard to the pass amendment or provision that I have received, as other Senators have, a great many telegrams from railway employees and from organizations of railway employees protesting against any provision being incorporated here that will prevent them from being supplied with or from accepting free transportation. I shall not take time to discuss that, as it has been fully discussed. I simply wish to say that I fully agree with them, and I believe that we ought not to enact any such legislation, and should we do so it would, in my judgment, be perpetrating a very great injustice upon those people. The matter of free transportation, as the Senator from Wisconsin [Mr. Spooner] said yesterday, enters partly into the consideration for their employment, and we have no moral right to deprive them of that privilege." 40 Cong. Rec. 7981. See also *id.* at 7984–7985. See Sen. Rep. No. 1242, 59th Cong., 1st Sess., Views of Mr. Tillman and Mr. Newlands, pp. 10, 16; 1 Sharfman, the Interstate Commerce Commission 44 (1931); *Sassaman* v. *Pennsylvania R. Co.*, 144 F. 2d 950, 956 nn. 7 and 8.

to mention it, since the purposes of the Act bore no relation, directly or remotely, to liability of a railroad for injury to passengers whether riding on passes or paying their fares. Even if some member of Congress had been acquainted with the *Adams* rule and had thought that the Hepburn Act bore some remote relation to the liability of railroads for injury to passengers, still he would have had no reason to believe this Court would subsequently expand that rule, then applicable only to "strictly free pass" passengers, to penalize employees and others authorized by Congress to ride on passes. As I see it, today's decision undermines the purpose Congress had in mind in approving the long-standing practice of employees' passes. It perverts an advantage expressly saved to employees into a penalty for making use of it. It makes traps of these passes.

VIII.

Moreover, the subjection of railroad employees while passengers to the hazards of uncompensated injuries is at war with the basic philosophy which has found expression in other industrial and social legislation for many years. Employers' liability acts, compensation acts, social insurance legislation of the federal government and various states, and a host of other legislative policies have been grounded upon the basic premise that care of the accidentally injured should be accepted as a matter of great public concern. Congress has also erased every vestige of the old judicially created fellow servant and assumption of risk doctrines in connection with suits by railroad employees on account of injuries suffered in the course of their employment. *Tiller* v. *Atlantic C. L. R. Co.*, 318 U. S. 54. The analogy between these now repudiated judicially created tort-law doctrines and the present rule was pressed on the Court in briefs for the

railroad in the *Adams* case. Congress has also emphatically outlawed all kinds of stipulations and contracts to exempt railroads from liability for their negligence in Employers' Liability Act cases. *Duncan* v. *Thompson*, 315 U. S. 1. All of this body of legislation, and much more to which reference could be made, has departed from the premise of the *Adams* and *Boering* decisions that it is more important to society that men abide by ticket and contract stipulations[8] than it is to have a system which provides compensation for the industrially injured and the dependents of those who are killed. For our society attempts to take care of its aged, unemployed, crippled and disabled, as well as the dependents of those killed by our industrial machine. See *Georgetown College* v. *Hughes*, 130 F. 2d 810, 822–825; *Interstate Commerce Comm'n* v. *Railway Labor Assn.*, 315 U. S. 373, 376–378. And the present railroad regulatory system is such that payment by railroads for injuries inflicted by them upon passengers is just as certainly borne by the public as though those injured and their dependents were directly supported by governmental institutions.

Whether allowance of damages for negligent death is the best way to meet the problems incident to transportation dangers is beside the point. Many courts generally, including this one and Utah's, may have been wrong in thinking that the possibility of having to pay damages for deaths of passengers due to railroad negligence would make railroads more cautious.[9] Perhaps society could

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[8] The *Boering* case was supported by the following statement: "The result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted." 193 U. S. at 451.

[9] *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 368. See *Jacobus* v. *St. Paul & C. R. Co.*, 20 Minn. ~~110, 113–114~~ 125, 130: "Whether the case

take care of injured passengers and their dependents in a less wasteful manner. But so long as Congress leaves the states free to adopt this method of meeting the problem, I think this Court should not handicap the states. Congress could provide a substitute for the state laws; we cannot.

IX.

Today's decision leaves states free to provide that railroads must pay for injury or death of passengers who can and do pay a full money fare for passage. This group is far more likely to include some people who are better able financially to take care of themselves in case of injury than are the members of some of the other groups permitted by the Hepburn Act to ride on free passes, all of whom are penalized by today's decision. These groups are in addition to railroad employees and their families, employees of other railroads; ministers of religion; Young Mens Christian Association workers; inmates of eleemosynary institutions; indigent, destitute, and homeless persons; disabled soldiers; and others in analogous categories. In following a course today that takes all of the above groups out from under the protection of state laws, the Court ignores the signs erected by Congress, all of which point in the opposite direction. Assuming the Court is right in saying that a rule with such consequences has become a part of the warp and woof of the Hepburn Act, it is a defective part which this Court alone has woven into the Act and which clashes with the congressionally fashioned fabric and design.

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be one of a passenger for hire, a merely gratuitous passenger, or a passenger upon a conditional free pass, as in this instance, the interest of the state in the safety of the citizen is obviously the same. The more stringent the rule as to the duty and liability of the carrier, and the more rigidly it is enforced, the greater will be the care exercised, and the more approximately perfect the safety of the passenger."

The result is a motley pattern. I would restore the original congressional design.

No sound argument has been or can be advanced for application of the 1904 *Adams* rule in today's entirely different judicial and legislative environment, even as the rule was first narrowly applied to a purely gratuitous carriage, except that it was unquestioningly accepted 34 and 25 years ago in cases where the rule's soundness was not challenged. When precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to destroy it.

The *Van Zant* case did hold that since the Hepburn Act the "incidents and consequences" of an employee's pass raised a federal question. It then held that the user of an employee's pass must stand by his contract to assume the risks of negligent injury by the railroad. Neither it, nor any other case since the Hepburn Act, until the case today, has held that the penalizing consequences of the father's contract must be visited upon his children. I would not so extend the more than dubious *Van Zant* doctrine.